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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. A-438

DIAMOND NATIONAL CORPORATION,
a Delaware corporation,

Appellant,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,

Appellee.

CROCKER-CITIZENS NATIONAL BANK,
a national banking association,

Appellant,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,

Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of these appeals and that substantial federal questions are presented. A single Statement is filed because the determinative question is identical in both cases. (Rule 15, par. 3, Supreme Court Rules.)

OPINIONS BELOW

The opinion of the California Court of Appeal (App. A, *infra,* 23-33, is reported at 49 Cal. App. 3d 778. The memorandum opinion and judgment of the California Superior Court (App. B, *infra,* 35-39) are not reported. These cases were consolidated below both for trial and on appeal.

JURISDICTION

The California Court of Appeal rendered its opinion and judgment on June 24, 1975 reversing the California Superior Court's judgment in the case brought by Diamond National Corporation (hereinafter "Diamond") and affirming the Superior Court's judgment in the case brought by Crocker-Citizens National Bank (hereinafter "Crocker").[1] The Court of Appeal based its decision on the ground that the state and local sales taxes imposed by California Revenue and Taxation Code § 6001, et seq. and § 7200 et seq. and collected pursuant to such statutory provisions by retailer Diamond from consumer Crocker, a national banking association, are not repugnant to the Constitution and laws of the United States. Appellants maintained to the contrary. Appellants' Petition for Rehearing filed in the California Court of Appeal on July 9, 1975 was denied July 24, 1975 (App. D, *infra,* 53-54) and appellants' Petition for Hearing filed in the California Supreme Court on August 1, 1975 was denied on August 28, 1975 (App. E 55). These petitions extended the finality of the judgment of the Court of Appeal. California Rules of Court, Appellate Rules, Rules 27 and 28.

Notices of Appeal in both cases (App. F, *infra,* 57-60) were filed in the California Court of Appeal on October 31,

[1]The Superior Court dismissed the case brought by Crocker solely on the ground that the case was moot since Diamond had stipulated, pursuant to California law, that any refund it received would be paid to Crocker.

1975. On November 13, 1975 the time for docketing the appeal was extended by Mr. Justice Brennan to January 25, 1976.

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. § 1257(2). The cases believed to sustain the jurisdiction of this Court are *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339 (1968); *Colorado National Bank of Denver* v. *Bedford,* 310 U.S. 41 (1940); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Society for Savings* v. *Bowers,* 349 U.S. 143 (1955); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110 (1953).

STATUTES INVOLVED

The California statutes involved are Revenue & Taxation Code, Division 2, Parts 1 and 1.5, § 6001, et seq. and § 7200, et seq.[2] (App. G, *infra,* 61-76). The Federal statute involved is 12 U.S.C. § 548, as effective prior to amendment by Public Law 91-156, 83 Stat. 434 (December 24, 1969). (App. H, *infra,* 77-79.)

QUESTIONS PRESENTED

The ultimate question presented is whether the California Sales and Use Tax Law and the Uniform Local Sales and Use Tax Law (California Revenue & Taxation Code § 6001 et seq. and 7200 et seq.) are invalid when applied to sales

[2]During the period involved in this litigation (March 25, 1968 to June 16, 1968) California levied a state sales tax of 4% under the California Sales and Use Tax Law (Revenue & Taxation Code § 6001, et seq.) and, in conjunction with county governments, a local sales tax of 1% under the Uniform Local Sales and Use Tax Law (Revenue & Taxation Code § 7200, et seq.). The local tax was collected by the State Board of Equalization and remitted to local governments. Because the taxes are identical, with certain exceptions not here relevant, reference will only be made to the state sales tax provisions.

by appellant Diamond to appellant Crocker, a national banking association, because the application of the California statutory provisions to such sales is repugnant to the Constitution and laws of the United States. This ultimate question involves, among others, the subsidiary question of whether the legal incidence of the sales taxes imposed by California Revenue & Taxation Code § 6001, et seq. and § 7200, et seq. is on a national banking association as a purchaser.

STATEMENT OF THE CASE

1. Material Facts

Crocker, which holds California's first national bank charter, issued in 1870, has been and is a national banking association chartered under and existing by virtue of the laws of the United States, specifically 12 U.S.C. § 21 et seq., with its principal office and place of business at One Montgomery Street, San Francisco, California. (Clerk's Transcript ("C.T.") filed in the Diamond National case pp. 25 and 26; Stipulation of Facts ("Stip.") ¶ 1. Certified copies of the records ("Clerk's Transcripts") in both the Diamond National and Crocker cases before the Court of Appeal have been filed with this Court. References hereinafter are to the Clerk's Transcript filed in the Diamond National case. The same Stipulation of Facts was filed in both cases.)

Crocker is actively engaged in business as a national banking association in a general commercial banking and trust business (C.T. 26, Stip. ¶ 5).

Diamond has been and is a Delaware corporation authorized to do business in California with its principal place of business in San Francisco, California (C.T. 26, Stip. ¶ 2). During the period March 25, 1968 through June 16, 1968 and for many years prior and subsequent thereto

Crocker purchased printed forms and various other items of tangible personal property from Diamond for use in its business as a national bank (C.T. 27, Stip. ¶ 6).

The total amount of Crocker's purchases from Diamond during the period in issue was $278,174.55 to which Diamond added the amount of $13,911.94 as "sales tax", "5% sales tax" or simply "tax" (C.T. 28-30 and 38-41, Stip. ¶¶ 9 and 10; Exs. 3-A through 3-D and 4). Subsequently, Diamond included such sales in its return filed with the Board and based upon such inclusion paid the Board the sum of $13,908.73 sales tax determined by multiplying $278,174.55 by 5% (C.T. 30-36, Stip. ¶¶ 14 and 15; C.T. 16, Ex. A to Defendant's Answer in No. 602734).

Crocker received and paid approximately 325 invoices from Diamond during the period in issue. On each invoice Diamond separately listed as an individual item an amount labelled "sales tax", "5% sales tax" or "tax".

Separately stating the sales tax to purchasers by showing it as an added item on the invoices or bills as Diamond did is the general practice and custom of retailers selling tangible personal property in California to all purchasers, including national banks (C.T. 34-35, Stip. ¶ 23. See excerpt from Stip. ¶ 23, App. J, *infra,* 85-86).

2. Proceedings Below and Federal Questions Presented

The complaints of appellants Diamond and Crocker were filed on April 18, 1969 in the California Superior Court pursuant to California Revenue & Taxation Code § 6933 (C.T. 1-11). The complaints prayed for a refund of California and local sales taxes upon the ground that sales to Crocker, a national banking association, were exempt from California and local sales taxes because the State of California is prohibited from taxing such sales under the Constitution and laws of the United States. The complaints

were based upon, and incorporated, claims for refund previously filed by Diamond and Crocker with, and denied by, the California State Board of Equalization ("Board") pursuant to California Revenue & Taxation Code § 6902, et seq. The claims also demanded refunds upon the ground that the state is prohibited from taxing such sales under the Constitution and laws of the United States.[3]

The case was tried by the Superior Court based upon the pleadings, a stipulation of facts, and briefs of counsel. The federal question raised on this appeal was the principal issue argued by counsel. In its Memorandum Opinion filed March 13, 1974 (App. B, *infra,* 35-39) the Superior Court specifically passed upon the federal question by holding that under the authority of *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339 (1968) (hereinafter "Berkshire" case) the legal incidence of the California sales tax is upon the consumer Crocker and therefore the tax cannot be applied to sales to Crocker, a national bank.

The Court of Appeal also specifically passed on the federal question. The court stated that: "These combined appeals * * * raise the question of whether, pursuant to Revenue and Taxation Code section 6052, the legal incidence of the California taxes falls on the purchasing national bank (Crocker), or on the retailer-vendor (Diamond). The parties agree that if the legal incidence of the tax is on Crocker, it is barred by former 12 United States Code section 548" (App. A, *infra,* 23, 24). The court concluded that the legal incidence of the California sales tax is upon the retailer and not the consumer national bank, and therefore California is not prohibited from taxing sales to a national bank under 12 U.S.C. § 548. The court

[3]The complaints and claims also raised issues of California law not relevant to this appeal.

held this Court's decisions in *Berkshire, supra,* and *United States* v. *Mississippi Tax Comm.,* 421 U.S. 599 (1975) were not applicable.

The Court of Appeal reversed the judgment of the Superior Court granting a refund to Diamond and affirmed the Superior Court's judgment denying Crocker's claim.

THE QUESTIONS ARE SUBSTANTIAL

1. The Questions are Properly Before the Court on Appeal

This is an appeal pursuant to 28 U.S.C. § 1257(2), where the validity of applying the California Sales and Use Tax Law and the Uniform Local Sales and Use Tax Law to purchases by a national banking association is drawn in question on the ground that such application of these statutes is repugnant to the Constitution of the United States and 12 U.S.C. § 548.

The California Court of Appeal, the highest California state court to consider the question, held that the application of the California state and local sales taxes to purchases by a national bank did not violate 12 U.S.C. § 548. This Court, therefore, has jurisdiction under 28 U.S.C. § 1257(2). *Berkshire, supra; Colorado National Bank* v. *Bedford, supra,* 310 U.S. at 47.

It is clearly established that the "validity" of a state statute is also said to have been sustained within the meaning of 12 U.S.C. § 1257(2), when the state court holds the statute applicable to a particular set of facts (as is true in the instant case) and the contention is made that such an application is invalid on federal grounds. *Berkshire, supra; Richfield Oil Corp.* v. *State Board of Equalization, supra; Dahnke-Walker Milling Co.* v. *Bondurant, supra.*

The question of whether the California sales tax statute can be validly applied to purchases by a national banking

association involves the further subsidiary question of whether the legal incidence of the sales tax is on the seller or the purchaser. The California Court of Appeal held that the incidence of such tax was on the seller. This subsidiary question is also a federal question where federal rights are involved, and should be determined by this Court. *Berkshire, supra.*

It is clear that the state court's construction of a taxing statute is not determinative of whether the tax deprives the taxpayer of a federal right. As this Court said in the *Berkshire* case:

> "Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax. See Society for Savings v. Bowers, 349 U.S. 143, 151, and the cases cited therein. And essentially the question for us is: On whom does the incidence of the tax fall? See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121-122. Also see Carson v. Roane-Anderson Co., 343 U.S. 232." (392 U.S. at 347)

To the same effect is *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).

Since the rights of the appellants under 12 U.S.C. § 548, and under the Constitution of the United States rest upon the characterization of the California sales tax as a tax upon the seller or purchaser, the California Court of Appeal's characterization of that tax as a tax upon the seller is not binding on this Court for the purpose of determining whether appellant Crocker's federal rights have been violated.

2. The Questions are Substantial and Important

A. There is a Need For the Court to Resolve a Conflict Between Federal and State Courts Over an Important Federal Issue.

The decision by the Court of Appeal means that in spite of this Court's opinions in *Berkshire* and *Mississippi Tax Commission* the California sales tax can be applied to sales to the United States and federal institutions exempted by Congress. This is the case even though retailers are required to separately state and collect the tax; the legislature clearly intended the tax to be passed on; and the stipulated facts state it is the general custom and practice for California retailers to separately state and collect the tax from customers, including the United States and national banks.

It is the Board's position that the California sales tax can be applied to sales to the United States and any federal institution expressly exempted from state taxation by Congress. See State Board of Equalization Regulation 1614 (App. I, *infra,* 81-83). The regulation makes clear that although the California statute presently exempts purchases of tangible personalty by the United States and its wholly-owned instrumentalities, leases of tangible personalty by the United States and such instrumentalities are not exempt. Furthermore, sales and leases to federal instrumentalities not wholly-owned by the United States (e.g. the Federal Reserve Banks) are fully taxable even though exempted by Congress. Thus the California courts and the Board view exemption of the United States and its instrumentalities to be wholly a matter of grace by the California legislature.

On the other hand, the lower federal courts have not agreed with the California courts and the Board. In a case involving the Nevada sales tax statute, which adopted ver-

batim the pertinent language of the California statute, both the district court and the Ninth Circuit held that the tax could not be applied to purchases by the United States. *United States* v. *Nevada Tax Comm.*, 291 F. Supp. 530 (D. Nev. 1968) aff'd 439 F.2d 435 (9th Cir. 1971). Both courts relied upon this Court's decision in *Berkshire.* The Federal District Court has also held that the California sales tax cannot be applied to leases to the United States. *United States* v. *State Board of Equalization,* Civil No. 72-2568-R (C.D. Calif. 1972). (App. C 45-49). The case is pending in the Ninth Circuit. *The California Court of Appeal expressly refused to follow the federal decisions.*

There is a need for this Court to assume jurisdiction of these cases and give direction to the California and federal courts in regard to the correct determination of the California sales tax as applied to the United States and exempt federal institutions. If this Court does not decide the issue now, the case brought by the United States in the federal courts must continue through the Ninth Circuit. Furthermore, if the United States is successful in the Ninth Circuit additional suits in the federal courts will undoubtedly be brought by federal instrumentalities to establish their exemption. See *Federal Reserve Bank of Boston* v. *Comm'r of Corporations and Taxation,* 520 F.2d 221 (1st Cir. June 30, 1975); *United States* v. *State Tax Comm.*, 481 F.2d 963 (1st Cir. 1973); *United States* v. *Dorgan,* 522 F.2d 969 (8th Cir. 1975).

Pending a final determination, retailers and the Board will be in confusion about whether or not the tax should be collected on sales to the United States and federal instrumentalities.

In regard to sales to national banks located in California, many claims for refund are pending on sales made to the banks since 1965. If this Court declines to take the present

appeals, the banks will be prompted to file actions in the federal and California courts to protect and prosecute their claims in case the Ninth Circuit holds in favor of the United States.[4]

Thus by accepting these appeals the Court can make a final determination in regard to the applicability of the California sales tax to federally exempted institutions and eliminate the need for further litigation in lower federal and state courts.

B. The Decision Below is in Direct Conflict with Decisions of This Court.

This Court has considered the impact of state sales taxes on the United States and federally exempted institutions in its recent decisions in the *Berkshire* and *Mississippi Tax Commission* cases. The basic determination for the Court has been whether the statutory scheme is such as to make clear the legislative intent of placing the burden of the tax upon the consumer. If this is clearly the legislative intention the tax cannot be passed on to the United States or other federally exempted institutions.

The *Berkshire* case is a classic analysis by this Court of the impact of state sales taxes upon federally exempted institutions. In that case the Massachusetts Supreme Judicial Court centered upon the questions of who must pay the tax to the state and against whom the state may proceed to collect nonpayment of the tax in determining

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[4]Beginning January 1, 1973, when the amendments to 12 U.S.C. § 548 became effective (App. H, *infra*, 77-79), the State of California acquired the power to bring this controversy to a close by amending the California Constitution (Article XIII, Section 27, formerly Article XIII, Section 16) and California Revenue and Taxation Code §§ 23181 and 23182. However, the State has not responded to the broader authorization granted by Congress and, therefore, this controversy continues indefinitely into the future.

the party who bears the legal incidence of the tax. Under this analysis the Massachusetts court found that the legal incidence was upon the seller. But this Court found such an analysis to be incorrect. In line with prior decisions, the Court was concerned with whether in actual operation the legislative scheme was such that it passed the direct burden of the tax to the consumer. If so the tax may not be collected from a federally exempt party. (See *Colorado National Bank of Denver* v. *Bedford, supra; Kern-Limerick, Inc.* v. *Scurlock, supra; Dickinson* v. *First National Bank of Homestead,* 393 U.S. 409 (1969), aff'g per curiam 291 F. Supp. 855 (N.D. Fla. 1968).

In *Berkshire* this Court considered the following elements in determining the party which actually bore the burden of the tax: (1) the statute contained a clear requirement that the seller separately state and collect the tax from the consumer; (2) if the tax were separately stated it became a debt which the seller could collect from the consumer; (3) the statute made it a crime for the seller to absorb tax. The fact that the Massachusetts statute contained no sanction against the seller if he failed to pass on the tax was not conclusive. This Court disagreed with the Massachusetts court's analysis that the lack of sanction was determinative. This Court held that whether or not there was a sanction the legislative intent was clear and that the inevitable effect of the statute was that businessmen in their everyday commercial affairs would try to abide by it and pass on the tax.

The principles established in the *Berkshire* decision were reaffirmed in *Mississippi Tax Commission* wherein the Court held that a state sales tax in the nature of a wholesale markup on liquor could not be collected by distributors from federal military establishments. The fact that the distributors had to pay the tax to the state was held not to

be determinative. The issue was whether the statute required the tax to be passed on to the consumer. In reviewing this issue, the Court noted in regard to the combined statutory and regulatory provisions that "the scheme [of taxation] unavoidably requires — that the out-of-state distillers and suppliers pass on the mark-up to the military purchaser." 421 U.S. at 609.

The California sales tax statute cannot in substance be distinguished from the Massachusetts sales tax statute. Under the California statute there is a clear requirement that the seller collect the tax from the consumer. The statute states: "The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done." California Revenue & Taxation Code § 6052. The California Supreme Court has stated that the language "insofar as it can be done" indicates a reservation upon the retailer's authority of reimbursement under the statute only where the consumer's constitutional rights would be infringed. *DeAryan* v. *Akers,* 12 Cal. 2d 781, 786, 87 P.2d 695 (1939). The statute makes clear the retailer's obligation to collect the tax by providing that it is a crime for the retailer to advertise, hold out or state to customers or anyone, directly or indirectly, that he will absorb the tax. California Revenue & Taxation Code § 6053. The statute and regulations of the Board also enforce the requirement that the retailer collect the tax from the consumer by placing an economic penalty or sanction upon the retailer if he fails to separately state the tax to the consumer. California Revenue &

Taxation Code §§ 6012 (last paragraph), 6054, and Regulation 1700, California Administrative Code, title 18, § 1700.[5]

Furthermore, if the retailer separately states the tax he may collect it from the consumer as a debt. *DeAryan* v. *Akers, supra.* The statute also directs the Board to furnish retailers with a table showing the correct amount of tax reimbursement to be collected from consumers for sales up to $100; the statute establishes tax reimbursement schedules for sales to $1.00. California Revenue & Taxation Code § 6052.5. If the retailer follows the table then he cannot be charged with an overcollection of the tax. On the other hand, if the retailer fails to follow the table and thereby overcollects the tax, or in any other way collects more than the correct amount of tax, he must refund the excess to the consumer or pay it to the Board which holds the amount in a fiduciary capacity for the consumer. California Revenue & Taxation Code § 6054.5; *Javor* v. *State Board of Equalization,* 12 Cal. 3d 790, 527 P.2d 1153, 117 Cal. Rptr. 305 (1974); *Decorative Carpets, Inc.* v. *State Board of Equalization,* 58 Cal. 2d 252, 373 P.2d 637 (1962).

If the retailer has erroneously collected the tax from the consumer there are two refund procedures available for the consumer. First, the consumer may request the retailer to file a claim for refund with the Board which will only

[5]The economic penalty is in the following form: if the retailer separately states the tax he need not include the tax reimbursement received from the customer in his gross receipts in computing his tax liability to the state; if he does not separately state the tax the tax reimbursement must be included in his gross receipts. The Massachusetts statute has a similar provision. Mass. Stats. 1966, Ch. 14, § 1(14)(c)(1v). Thus if a retailer makes sales of $1,000,000 per month he would collect sales tax of $50,000 per month at a 5% rate. If the retailer separately states the tax his liability to the state is $50,000. If the tax is not separately stated the retailer would owe an additional tax of 5% on the $50,000, or an additional $2,500 per month or $30,000 per year. The pertinent part of Regulation 1700 is set forth in Appendix J, *infra,* 85-86.

refund the tax to the retailer if he agrees to pay the refund to the consumer. California Revenue & Taxation Code §§ 6902, 6054.5; *Decorative Carpets, Inc., supra.* Secondly, the consumer can file an action joining the retailer and the Board as defendants to recover an overpayment of sales tax either as an individual action or as a class action on his own behalf and on behalf of other consumers similarly situated. *Javor* v. *State Board, supra.*

It has long been recognized by the California courts that the legislature intended the consumer to be the source of payment of the tax and that under the statute retailers are prohibited from absorbing the tax so that large retailers cannot drive small retailers out of business. *DeAryan* v. *Akers, supra,* 12 Cal. 2d at 785. The California legislature has frankly stated that it intended the retailer to pass on the tax to the consumer.[6]

The proof of the effectiveness of the statute is found in the stipulated facts which state that it is ". . . the general practice and custom of retailers selling tangible personal property in California to separately state 'sales tax reimbursement' in setting forth the total amounts charged their customers including national banks . . . and it is the general practice of California customers, including national

[6]See Report of the [California] Senate Interim Committee on State and Local Taxation (April, 1951) p. 57 which states:

> California is one of several states that specifies that the tax shall be collected by the retailer from the consumer. Each retailer is required to indicate separately in the prices of property offered for sale the amounts therein that represent "reimbursement" of the tax to the retailer. This "sales tax reimbursement" must be calculated on the base sales price of the property excluding the tax in accordance with a posted schedule. This provision is designed to prevent absorption of the tax or any representation that the tax has been absorbed by the retailer.

See also Assembly Interim Committee on Revenue and Taxation, Financing Local Government in California, Vol. 4, No. 13 (Dec. 1964) p. 49 for a similar statement.

banks, to pay 'sales tax reimbursement' as part of the total amount paid for the goods." (C.T. 33, Stip. ¶ 22; App. J, *infra,* 85-86.) The record further establishes that in each transaction involved in these cases the retailer in fact separately stated and passed on the tax to the national bank purchaser. (C.T. 28, 29; Stip. ¶¶ 9, 10.)

In the face of all this, how did the Court of Appeal hold that the burden of the tax is not on the consumer bank? It did so by refusing to follow the principles laid down in *Berkshire* and *Mississippi Tax Commission.* The Court of Appeal also felt bound to follow an old California Supreme Court decision which had determined the question of the incidence of the sales tax on national banks under principles now rejected by this Court. *Western Lithograph Co.* v. *State Board of Equalization,* 11 Cal. 2d 156, 78 P.2d 731 (1938).

The Court of Appeal ignored the total thrust of the California statute and instead concentrated on a particular section of the law, i.e., Section 6052, California Revenue & Taxation Code (App. G, *infra,* 62). By doing so the court found that the retailer had an option whether or not to collect the tax. On the other hand, the Court said that under the Massachusetts sales tax law it was "mandatory" that the retailer collect the tax.

In the first place, this construction of the Massachusetts statute (which the California Attorney General propounded to the Court of Appeal) is totally inaccurate. The Massachusetts court construed the statute as not requiring the retailer to pass on the tax. The Court said ". . . neither subsection 3 nor 23, singly or together, imposes any sanction on a vendor who chooses not to charge the tax. His liability to the State remains at three per cent of his gross receipts *whether or not he chooses to collect the tax from his purchasers.*" Also "[t]he vendor *at his option* may add

the tax to his selling price without being accused of a price increase." (353 Mass. 172, 177-180, 229 N.E. 2d 245, 251 and n. 14 (1967). (Emphasis added.) This Court accepted the Massachusetts Court's interpretation of the statute in regard to sanctions, but held that it was nevertheless clear that the legislature intended the retailer to pass on the tax and therefore the legal burden of the tax was on the consumer.

Secondly, whatever "option" the retailer is supposed to have under the California statute is no greater than the "option" under the Massachusetts statute. The California statute effectively requires the retailer to separately state and collect the tax and the only limitation on his right of collection is the consumer's constitutional rights. The California courts have held that the retailer can collect the separately stated tax from the consumer the same as a debt. Also the California statute enforces these provisions by making it a crime for the retailer to advertise, hold out or state to the consumer or anyone, directly or indirectly, that he will absorb the tax. Thus the force of the statute and the Board's implementing regulations is such that retailers as a matter of practice find no "option" in the statute. The stipulated facts support this legal analysis by stating that it is the custom and practice of retailers to separately state and collect the tax.

It is submitted that the Court of Appeal and the California Attorney General are playing games with words such as "mandatory" and "requirement" and ignoring the plain thrust of the statute; the clear legislative intent; and the inevitable effect of the statute upon retailers.

The California court in the *Western Lithograph* decision and the Massachusetts court in the *Berkshire* decision developed a rationale for determining whether the retailer or the consumer bore the burden of the tax. In those deci-

sions it was held that the burden of the tax was on the retailer because he must pay the tax to the state. But that formalistic test was specifically rejected by this Court. The proper test is to determine whether the legislature has established a scheme which has the inevitable effect of passing the tax on to the consumer. The *Western Lithograph* case never addressed itself to that issue, nor did the Court of Appeal in the present case. This is understandable in that the Court of Appeal felt it was bound by the California Supreme Court's *Western Lithograph* decision. The effect of the Court of Appeal's decision however is that it failed to follow the test established by this Court and instead felt obligated to follow *Western Lithograph* which was decided upon a rationale rejected by this Court.

The converse to the present case was presented in *Colorado National Bank of Denver* v. *Bedford, supra.* That case involved a 2% state tax on, *inter alia,* the value of safe-deposit services. The Colorado National Bank contended that it was immune, under 12 U.S.C. § 548, from the payment of a tax on the rentals it received for such services. The Court assumed the tax would be invalid if laid upon the bank, but held that the tax was upon the user of the safe-deposit boxes and not upon the bank. Hence, the tax was valid. It based this conclusion on the ground that the tax statute required the bank ". . . *as far as practicable* [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item . . ." (Emphasis added.) 310 U.S. at 44. For this reason the court was of the view that the incidence of the tax was on the user of the safe-deposit box.

The Court of Appeal made another fundamental error in applying the rule of *Western Lithograph* and other California decisions to the question of the legal incidence of the California tax. The Court of Appeal erroneously concluded that this Court's decision in *Gurley* v. *Rhoden,* 421 U.S. 200 (1975), stands for the proposition that where a state court has determined the legal incidence of state taxes as applied to a federally exempted institution this determination is thereafter generally binding upon later courts including the United States Supreme Court. Of course, such a rule cannot stand because it would be ". . . saying that a state court might interpret its statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign." *Kern-Limerick, Inc., supra,* 347 U.S. at page 121.

As this Court has stated:

> "Where a federal right is concerned, we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw,* 280 U.S. 363, 367 (1930).

This passage has been cited with approval in many cases. See, e.g., *Society for Savings* v. *Bowers,* 349 U.S. 143, 151 (1955); *Kern-Limerick, Inc., supra,* 347 U.S. 110, 121-122. In fact, in *Berkshire* this Court explicitly declined to be bound by the Massachusetts court's interpretation of the state statute stating "[b]ecause the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax." (392 U.S. at 347)

The *Gurley* case was not concerned with the incidence of a state tax upon a federally exempted institution. The case involved the validity of a state statute under the Due Process clause of the Fourteenth Amendment, and the rule in the case regarding statutory interpretation related to the fact that this Court will generally look to a state court's interpretation of the statute to determine how it operates

so that the Court can thereupon determine whether the statute violates the Federal Constitution. Such a rule does not mean that the Court is bound by a state court's decision on constitutional issues, and in particular a state court's decision on federal exemption from state taxes. For other examples of the rule of statutory interpretation set forth in *Gurley,* see *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965) and *Evco* v. *Jones,* 409 U.S. 91 (1972).

It is particularly inappropriate for the Court in this case to be bound by *Western Lithograph* which was decided upon a theory which this Court has explicitly rejected.

C. The Decision Below Raises the Possibility of Attacks on Federal Exemption in Other States

Another reason for the Court to take these cases is to make clear that the California statute is not an exception to the *Berkshire* doctrine so that other states will not be prompted to change their statutes in an effort to tax the United States and its instrumentalities. After all, the California experience has been that the statute is extremely effective in requiring retailers to collect the tax from consumers and that the direction to the retailer to collect the tax "insofar as it can be done" is not a real limitation on requiring that collection. This Court's clarification of the application of *Berkshire* to the California tax will certainly avert possible problems arising in other states.

After *Berkshire* many states announced that they would follow that decision and not apply their sales tax to national banks.[7] Presumably this construction of the statute

[7]See, e.g., *Florida,* Release No. 068-55, Fla. Rev. Comm., June 25, 1968, 1 CCH Fla. State Tax Rptr. ¶ 60-204a.40; *Idaho,* CCH Idaho State Tax Rptr. ¶¶ 60-203a and 60-203b; *Maine,* CCH Maine State Tax Rptr. ¶ 60-218.53 and .54; *Nevada,* Opin. Atty. Gen., No. 540 (Sept. 18, 1968), CCH Nev. State Tax Rptr. ¶ 200-455; *New Jersey,* 1 CCH N.J. State Tax Rptr. ¶¶ 60-220.50, .501 and .502; *Oklahoma,* 1 CCH Okla. State Tax Rptr. ¶ 60-215.55; *Pennsylvania,* 2 CCH Pa. State Tax Rptr. ¶¶ 60-254, .50 and .51.

would also apply to sales to the United States and its other instrumentalities. Absent clarification by this Court it is quite possible that a number of states would be inclined to amend their statutes to require the retailer to collect the tax "insofar as it can be done" if the states can thereby tax the United States and its instrumentalities.

3. Crocker is Supporting Diamond's Appeal

The purchaser, Crocker, is a party to this litigation because it is the real party in interest. It is also the party with the necessary information to prove its exempt status. If the Court determines that the legal incidence of the sales tax is on the purchaser, then Crocker (not Diamond) is entitled to the refund of taxes. Under California law the retailer, Diamond, is only entitled to the refund if it agrees to pay the refund to Crocker, which Diamond has agreed to do. (See California Revenue & Taxation Code § 6054.5; *Decorative Carpets, Inc.* v. *State Board of Equalization, supra.*)

If the Court assumes jurisdiction in the appeal of Diamond certainly it should assume jurisdiction in the appeal of Crocker.

Crocker originally commenced its own refund action to give the California courts the opportunity to determine if a judgment should be entered for Crocker if it was determined that the legal incidence of the tax was on Crocker. In this appeal, however, Crocker is not asking this Court to direct the California courts to enter a judgment in its favor. Crocker is supporting the position of Diamond that this Court should reverse the judgment of the California Court of Appeal in the Diamond appeal and reinstate the judgment of the Superior Court in favor of Diamond. Thus Crocker is content with the judgments of the Superior Court in the Diamond and Crocker cases.

CONCLUSION

For the foregoing reasons appellants submit that the decision of the California Court of Appeal is plainly wrong, and that the questions presented by these appeals are properly before this Court, are substantial, and are of public importance.

Respectfully submitted,

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APPENDIX A

(Opinion of Court of Appeal of the State of California, First Appellate District, Division Two. From California Official Reports, number 21, July 31, 1975, 49 Calif. App. 3d 778. The judgments of the Court of Appeal are set forth in the final paragraph of its opinion and are not separately entered in the records of the court.)

[Civ. No. 35143. First Dist., Div. Two. June 24, 1975.]

DIAMOND NATIONAL CORPORATION,
Plaintiff and Respondent,
v.
STATE BOARD OF EQUALIZATION,
Defendant and Appellant.

[Civ. No. 35698. First Dist., Div. Two. June 24, 1975.]

CROCKER-CITIZENS NATIONAL BANK,
Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION,
Defendant and Respondent.

TAYLOR, P. J.—These combined appeals[1] from two actions for refunds of state and local[2] sales taxes paid to the State Board of Equalization in 1968, consolidated for

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[1]In No. 35143, Diamond's action for a refund, the court below entered judgment in favor of Diamond and the board appeals. In No. 35698, Crocker's action for a refund filed on the theory that it was the taxpayer, the only issue was Crocker's standing to sue. As Diamond stipulated that it would pay to Crocker the amount refunded pursuant to Revenue and Taxation Code section 6054.5, the court dismissed Crocker's action as moot and Crocker appeals.

[2]As the local sales tax law (Rev. & Tax. Code, § 7200 et seq.), with certain exceptions not pertinent here, in effect, incorporates by reference the state Sales and Use Tax Law (Rev. & Tax. Code, § 6001 et seq.), we shall simply refer to the California sales taxes.

trial on stipulated facts, raise the question of whether, pursuant to Revenue and Taxation Code section 6052, the legal incidence of the California taxes falls on the purchasing national bank (Crocker), or on the retailer-vendor (Diamond). The parties agree that if the legal incidence of the tax is on Crocker, it is barred by former 12 United States Code section 548.[3] (1a) For the reasons set forth below, we have concluded that under California law, the legal incidence of the tax is on the vendor-retailer, and the judgment in favor of Diamond in No. 35143 must be reversed, and the judgment of dismissal as to Crocker in No. 35698 affirmed.

As the facts were stipulated, we set forth briefly only the basic facts pertinent to the central legal issue before us. Diamond supplied printed forms and other items of tangible personal property to Crocker for use in its business as a chartered national bank. The parties understood and agreed that the item prices stated by Diamond were exclusive of "sales tax reimbursement," which would be added to the stated price in computing the total amount Crocker would pay for the merchandise. During the period in issue (March 25, 1968-June 16, 1968), Crocker paid the sum of $292,086.49, of which $278,174.55 represented the stated price and $13,911.84 represented "sales tax reimbursement."[4] Diamond included the $278,174.55 in tax returns filed with the board, paid the appropriate tax, and subsequently filed for refund of $13,908.73;[5] Crocker also filed for a refund of the same amount. The board disallowed both refunds. Diamond agreed that any refund returned to it would be refunded to Crocker pursuant to Revenue and Taxation Code section 6054.5 and *Decorative Carpets, Inc.* v. *State Board of Equalization*, 58 Cal.2d 252 [23 Cal.Rptr. 589, 373 P.2d 637].

Revenue and Taxation Code section 6052 provides: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done."

Preliminarily we note that our Supreme Court long ago held that this statute imposes a vendor tax (*Western L. Co.* v. *State Bd. of Equalization*, 11 Cal.2d 156, 162 [78 P.2d 731, 117 A.L.R. 838]). In *Western Lithograph*, the court construed statutes of 1933, chapter 1020, page 2602, section 8½, the predecessor of Revenue and Taxation Code section 6052.

Diamond, relying on *Agricultural Bank* v. *Tax Comm'n*, 392 U.S. 339 [20 L.Ed.2d 1138, 88 S.Ct. 2173], as recently

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[3]National banks, such as Crocker, may be taxed by a state only as provided by Congress (*Security-First Nat. Bk.* v. *Franchise Tax Bd.*, 55 Cal.2d 407, 413 [11 Cal.Rptr. 289, 359 P.2d 625]). At the time here pertinent, 12 United States Code section 548 provided that states may tax national banks only for: 1) national bank shares; 2) dividends derived from taxable income of an owner or holder thereof; 3) net income of such associations; and 4) according to or measured by their net income. Subsequently the statute was amended (Pub.L. 91-156, 83 Stats. 434, enacted Dec. 24, 1969) and became effective at date of enactment, with a permanent amendment effective subsequently that removed the former exemption from state sales and use taxes.

[4]The term "sales tax reimbursement" is noted in the Revenue and Taxation Code to describe amounts such as those paid by Crocker to Diamond, which were separately stated on the invoices and therein referred to as "sales tax" or "5% sales tax" and on purchase orders referred to as "tax."

[5]The difference arose because the amount paid by Diamond to the board was based on its total gross receipts while the "sales tax reimbursement" was computed on the basis of the individual sales transactions as required by section 6052.5 and the "sales tax reimbursement" schedules which provide for rounding amounts of "sales tax reimbursement" to whole cents on each individual invoice. In addition, there were either clerical mistakes or additional rounding factors in computing the amount of "sales tax reimbursement" on individual invoices in the amount of $2.90. Based on the foregoing, the parties agree that the refund from the board which is in dispute is $13,908.73 instead of $13,911.84, set forth in Diamond's refund claims.

reaffirmed in *United States* v. *Mississippi Tax Commission* (June 2, 1975) 43 U.S. Law Week 4681 [—L.Ed.2d —, — S.Ct. —), urges that since we are construing a federal exemption, we are bound to conclude that the legal incidence of the tax fell on the purchaser. However, the question presented by a claim of exemption under a federal statute granting immunity to national banks from state sales taxes goes beyond the mere claim of an automatic exemption for a federal agency. The national bank must also show that the "incidence" of the tax is on it (*Huntington Nat. Bank of Columbus* v. *Porterfield* 23 Ohio St.2d 131 [263 N.E.2d 227], cert. den. 401 U.S. 1005 [28 L.Ed.2d 542, 91 S.Ct. 1260]).

In *Agricultural Bank,* the United States Supreme Court squarely rejected the proposition that the legal incidence of a tax always fell on the person legally liable for it, and held that pursuant to the Massachusetts statute there in issue,[6] the Massachusetts Legislature intended that the tax

[6]Subsection 3 of the Massachusetts sales tax provides: "Reimbursement for the tax hereby imposed *shall be paid by the purchaser* to the vendor and each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section,* or an amount equal as nearly as possible or practicable to the average equivalent thereof; *and such tax shall be a debt from the purchaser to the vendor,* when so added to the sales price, and shall be recoverable at law in the same manner as other debts." (Acts and Resolves, 1966, ch. 14, § 1, subsec. 3; (italics in original).)

"This subsection reads to us as a *clear requirement* that the sales tax be passed on to the purchaser . . . There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." (*Agricultural Bank, supra,* at pp. 347-348; italics added.)

In the decision below that was reversed (229 N.E.2d 245, at pp. 249 and 250), the Massachusetts Supreme Court characterized the Massachusetts tax as a hybrid type distinct from vendor taxes (like California's) and purchaser taxes like those of other states. The United States Supreme Court accepted this characterization and disagreed with the Massachusetts Supreme Court only as to the legal incidence of the tax.

be "passed on" to the purchaser and accordingly was a tax on the purchaser and not the vendor. The court emphasized (at p. 347) that the legislative intent was controlling. In *United States* v. *Mississippi Tax Commission, supra,* slip opinion at page 4683, which involved the question of whether the Mississippi wholesale markup fell on the out-of-state distiller or on the purchasing federal military installations,[7] the court emphasized that ". . . the controlling significance of *First Agricultural Bank* for our purposes is the test formulated by that decision for the determination of where the *legal incidence* of the tax falls, namely, that where a state *requires* that its sales tax be passed on to the purchaser and be collected by the vendor from him, *this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser*" (italics supplied).

Agricultural Bank thus simply held that: (1) if the tax must be passed on, the incidence is on the purchaser; (2) legislative intent is controlling as to whether the pass-on is mandatory; and (3) lack of sanction against the vendor for failing to pass-on does not negate a clearly worded pass-on provision. In the *Mississippi Tax Commission* case, *supra,* the United States Supreme Court followed the mandatory pass-on test of *Agricultural Bank, supra.*

(2) Unlike the Massachusetts sales tax law or Mississippi tax Regulation 25, this state has no mandatory re-

[7]In the recent case, so far as pertinent here, the United States Supreme Court held that since Mississippi tax Regulation 25 provided that military facility shall bear the usual wholesale markup in price and pay the amount directly to the distiller who "in return shall remit the wholesale markup" to the tax commission, under *Agricultural Bank,* the legal incidence of the tax was on the military and therefore barred.

quirement that its sales taxes be "passed on"[8] to the purchaser. As indicated above, Revenue and Taxation Code section 6052 provides that "[t]he tax hereby imposed shall be collected by the retailer from the consumer *in so far as it can be done.*" It is well settled that "[t]his section *merely allows* a retailer to reimburse himself for payment of the tax. He is *limited* in so doing where the consumer's contractual or constitutional rights are infringed" (Code Commissioners' Note, citing *De Aryan* v. *Akers,* 12 Cal.2d 781 [87 P.2d 695]; (italics supplied). The retailer is *permitted* to pass the tax on to the consumer, but he is *not charged with a mandatory duty* to collect the tax (*Coast Elevator Co.* v. *State Bd. of Equalization,* 44 Cal.App.3d 576, 588 [118 Cal.Rptr. 818]; *Pac. Coast Eng. Co.* v. *State of California,* 111 Cal.App.2d 31, 34 [244 P.2d 21]). Moreover, "[w]hile the act authorizes the retailer to collect the tax 'from the consumer in so far as the same can be done,' . . . that does not make it a consumer's tax." (*Ainsworth* v. *Bryant,* 34 Cal.2d 465, 474 [211 P.2d 564]).

In *De Aryan* v. *Akers,* 12 Cal.2d 781 [87 P.2d 695], the state Supreme Court declared that the statute ". . . *must be deemed to indicate a reservation* only in those cases where so to pursue the authority of reimbursement to the retailer would infringe the consumer's existing contractual or other constitutional rights." (Id. at p. 786; italics supplied.) Indeed, unlike the mandatory provisions of the Massachusetts statute and the Mississippi tax Regulation 25, Revenue and Taxation Code section 6052 *expressly bars*

[8]While the term "pass on" is repeatedly used by all courts, presumably as a matter of convenience, the inaccuracy of the use of the term in this manner was recognized in *Lash's Products Co.* v. *United States,* 278 U.S. 175 [73 L.Ed. 251, 49 S.Ct. 100], where the court said at page 176 [73 L.Ed. at p. 252]: "The phrase 'passed the tax on' is inaccurate. . ."

the right to reimbursement when a constitutional right would be infringed.[9]

In a bootstrap argument, Diamond attempts to equate the caveat of the California statute, "in so far as it can be done", with the language "as nearly as possible or practicable" from the Massachusetts statute, and further asserts that the *Agricultural Bank* holding regarding the "same provisions" dictates abandonment of the established California construction, because determination of the incident of the California tax is a federal question and not a state question. However, we find this argument less than convincing for two reasons.

First, in comparing caveats, Diamond takes the Massachusetts "as nearly as possible or practicable" out of context. When read within subsection 3 of the Massachusetts sales tax, as set forth in footnote 7 above, the term clearly refers to collection of the average equivalent of the full amount of the tax. As discussed above, this is *not* the meaning of the California caveat.

Second, as recently stated in *Gurley* v. *Rhoden* (decided May 12, 1975) 43 U.S. Law Week 4549, at page 4552: "[A] State's highest court is the final judicial arbiter of the meaning of state statutes [citation], and therefore our review of the holding of a state court respecting the legal incidence of a state excise tax is guided by the following: 'When a state court has made its own definitive determination as to the operating incidence . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is *consistent with the statute's reasonable interpretation it will be deemed conclusive.*'" (Italics added.)

Thus, given the clear mandatory wording of both the Massachusetts statute and Mississippi tax Regulation 25,

[9]"The tax hereby imposed shall be collected by the retailer from the consumer *in so far as it can be done.*" (Italics supplied.)

and in view of the obvious difference of Revenue and Taxation Code section 6052 as construed by the courts of this state since its inception, we think neither *Agricultural Bank* nor the *Mississippi Tax Commission* cases have overruled *Western Lithograph* and the other California cases. Further, as an intermediate appellate court, we are bound to follow the construction of a state statute by the decisions of our state Supreme Court (*Market St. Ry. Co.* v. *Cal. St. Bd. Equal.*, 137 Cal.App.2d 87, 98 [290 P.2d 20]).

Accordingly, we need not discuss in great detail two recent federal decisions, cited by Diamond for the proposition that the legal incidence of the California sales taxes is upon the purchaser. The first[10] of these is a Federal District Court case currently on appeal to the Ninth Circuit, and accordingly of little or no precedential value. The second, *United States* v. *Nevada Tax Commission* (9th Cir. 1971) 439 F.2d 435, summarily affirmed a trial court decision[11] that found the legal incidence of the Nevada sales tax to lie with the vendee. Although the Nevada law is similar to the California law, we find the case to be of negligible assistance in determining *California* legislative intent. We think it is well settled by *Western L. Co., DeAryan* and other authorities cited above, that since the vendor is permitted and encouraged but not required to pass on the sales taxes to the consumer, the legal incidence of the California sales

[10]*United States* v. *State Board of Equalization*,—F.Supp.—.

[11]In *Meyer Const. Co.* v. *Corbett*, 7 F.Supp. 616, the Federal District Court found the tax to be on the retailer rather than the consumer. In discussing the impact of that case, the California Appellate Court noted that while it should be given persuasive force, it is not binding authority (*People* v. *Herbert's of Los Angeles, Inc.*, 3 Cal.App.2d 482, 484 [39 P.2d 829]). The court below treated the question solely as a federal question, i.e., whether federal instrumentalities are immune from state taxation.

taxes falls on the vendor. It follows that the trial court erred[12] in concluding that *Agricultural Bank, supra,* changed the preexisting California law.

Diamond also attempts to expand the scope of *Javor* v. *State Board of Equalization,* 12 Cal.3d 790 [117 Cal.Rptr. 305, 527 P.2d 1153]. However, *Javor* is a limited decision under "unique circumstances" whereby a customer can join the board in an action against the retailer. The *action remains against the retailer,* and the board is joined strictly to protect the integrity of the sales tax by ensuring that the customers receive their refunds. Thus, the retailer is not relieved of the legal incidence of the sales tax.

(3) Diamond also attempts to argue that *Decorative Carpets,* 58 Cal.2d 252 [23 Cal.Rptr. 589, 373 P.2d 637], and the enactment of Revenue and Taxation Code section 6054.5 support its position that the legal incidence of the California sales taxes are on the purchaser rather than the vendor. *Javor, Decorative Carpets* and section 6054.5 deal with the refund remedy of customers and do not determine the incidence of the tax. In fact, in Revenue and Taxation Code section 6054.5, the Legislature clearly indicates that "nothing in this legislation shall be construed to affect the basic principle that the incidence of the California sales tax is on the retailer." (Stats. 1961, ch. 872, p. 2289).

[12]The trial court also erroneously relied on *Panhandle Oil Co.* v. *Knox,* 277 U.S. 218 [72 L.Ed. 857, 48 S.Ct. 451, 56 A.L.R. 583]; however, as noted in *Gurley* v. *Rhoden, supra,* at page 4552: "The Court's *Panhandle* opinion does not focus upon whether the Mississippi statute laid the legal incidence of the tax upon the distributor. Rather the rationale was that the tax was bad because, if laid upon distributors, the distributors were able to shift its burden to the purchaser. The Court has since expressly abandoned that view, and has accepted the analysis of the dissent. In *Alabama* v. *King & Boozer, supra,* 314 U.S., at 9, the Court held: 'So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox* . . . , we think it no longer tenable'."

We need not discuss the authorities from foreign jurisdictions cited by Diamond. as all are factually distinguishable and of no guidance in examining the basic question of the intent of the California Legislature as to which party bears the legal incidence of the sales tax.

Diamond's remaining contentions relating to administrative construction and the 1951 and 1964 Reports of Legislative interim committees are also neither pertinent[13] nor persuasive,[14] and need not be discussed here.

(1b) Accordingly, we conclude that since the California statute does not mandate that the state and local sales taxes must be passed on to the purchaser and the courts of this state have consistently held that the legal incidence of these taxes is on the vendor, the court below erred in entering judgment in favor of Diamond.

On its appeal, Crocker attempts to argue that the above disposition of Diamond does not necessarily dispose of all of the issues presented. However, in view of our conclusion in the Diamond appeal that the legal incidence of the California sales taxes falls on Diamond, Crocker has no standing to seek a refund from the board. Crocker's contentions pertaining to Revenue and Taxation Code section 6937 are irrelevant in view of the recent holding of *Javor, supra,* that a purchaser has no direct recourse against the board

[13]The basic sales tax statutes were enacted in 1933 and 1935 and were held in *Western L. Co., supra,* at page 162, to "specially negative any intent of the legislature that the tax should be considered as a tax on the consumer." (Cf. *People* v. *Grazer,* 138 Cal.App.2d 274, 279 [291 P.2d 957].)

[14]For example, Diamond refers to the board's Regulation 1700 which states that each "retailer who collects an amount" must follow certain procedures. This certainly does not remove the element of choice; it merely helps assure that the retailer collects the correct amount of the tax. In this legislative discussion, as in many of its contentions, Diamond fails to clearly and consistently differentiate between the significant *legal incidence* and the economic burden of a tax and consistently interchanges the two concepts.

for a refund of excessive sales tax reimbursement paid to the vendor. Of course, our holding has no bearing on the possibility of a contract action by Crocker against Diamond.[15]

The judgment in Diamond (No. 35143) is reversed and the judgment in Crocker (No. 35698) affirmed.

Kane, J., and Rouse, J., concurred.

[15]The vendor is not entitled to a sales tax reimbursement where the provision for payment is not included in the terms of the contract (*Livingston Rock & Gravel Co.* v. *De Salvo,* 136 Cal.App.2d 156 [288 P.2d 317]; *Clary* v. *Basalt Rock Co.,* 99 Cal.App.2d 458 [222 P.2d 24]).

APPENDIX B

IN THE

Superior Court of the State of California

IN AND FOR THE

City and County of San Francisco

DEPARTMENT NUMBER EIGHT

CROCKER-CITIZENS NATIONAL BANK, a national banking association, *Plaintiff*, v. STATE BOARD OF EQUALIZATION, an agency of the State of California, *Defendant.*	No. 602733
DIAMOND NATIONAL CORPORATION, a Delaware corporation, *Plaintiff*, v. STATE BOARD OF EQUALIZATION, an agency of the State of California, *Defendant.*	No. 602734

MEMORANDUM OPINION AND NOTICE OF INTENDED DECISION

In *First Agricultural Bank of Berkshire County* v. *State Tax Commission* (1968), 392 U.S. 339 [20 L.Ed.2d 1138, 88 S.Ct. 2173], the court struck down a Massachusetts court decision which held that the state sales tax was applicable to national banks. The court noted the tax was passed on from the retailer to the bank pursuant to the Legislature's

intent. It was this intent the court held to be important. In cases where the Legislature does not intend that the tax be passed to the consumer the sales tax will be upheld even if its economic incidence happens to fall there, but where the intent of the Legislature is clear that it be passed on, the tax must be struck down when it falls on national banks.

The court held that the Massachusetts Legislature intended that the tax be passed on to the consumer because of two code sections (Mass. Acts and Resolves, 1966, Ch. 14, Sec. 1, Sub-Sec. 3, 23) which state respectively that reimbursement for the tax shall be paid by the purchaser as far as possible and that it is not lawful for the vendor to advertise that he will pay the tax. The court chose to focus on these two code sections as expressive of legislative intent even though the Massachusetts Supreme Judicial Court had ruled that they did not *require* the vendor to pass the tax along to the consumer (*First Agricultural Bank of Berkshire County* v. *State Tax Commission* (1967), 353 Mass. 172, 179-180 [229 N.E.2d 245]).

The defendant claims that the case is distinguishable since a long line of California cases have held that the incidence of the state sales tax is on the retailer and that Sections 6052 and 6053 do not change that result (*Ainsworth* v. *Bryant* (1949), 34 Cal.2d 465 [211 P.2d 564]; *Western Lithograph Co.* v. *State Board of Equalization* (1938), 11 Cal.2d 156 [78 P.2d 731]). Section 6052 of the Revenue and Taxation Code states that the sales tax shall be collected by the retailer from the consumers insofar as it can be done, and Section 6053 prohibits the retailer from advertising that he will absorb the tax.

The case is not distinguishable though. The Supreme Court in the *First Agricultural Bank of Berkshire County* case ignored the state courts' ruling that the incidence of the tax fell on the retailer and based its decision solely

on the intent of the Legislature as contained in the above named code sections. The California courts have also held that the incidence of the tax falls upon the retailers, but clearly the Supreme Court is interested only in what the Legislature has said, not in what the courts have said. And the intent of the California Legislature seems to be expressed in essentially the same language as the intent of the Massachusetts Legislature.

The defendant also claims the decision of the Federal District Court for the Central District of California in *United States* v. *State Board of Equalization* (Civil No. 72-7568-R) should carry no weight since this court is rather bound by the decisions of the California Supreme Court. In that case, the court ruled that the incidence of the California sales tax fell upon the consumer. Contrary to the defendant's contention though, the question of whether certain instrumentalities of the federal government are immune from state taxation has been held to be a federal question on which the authority of the federal courts is controlling (*First Agricultural Bank of Berkshire County* v. *State Tax Commission, supra,* at page 347; *United States* v. *Nevada Tax Commission* (9th Circuit 1971), 439 F.2d 435, 439).

Lastly, the defendant alternately challenges the plaintiff's standing to bring this action either as the retailer or as the consumer. It is a very curious argument indeed. First, the defendant claims that the Diamond National Corporation does not have standing to sue since the amount of sales tax it pays is measured by its gross receipts from sales and is affected by whether it can collect reimbursement from the consumer.

For this position the defendant relies on two California cases which are both distinguishable. In *National Ice and Cold Storage* v. *Pacific Fruit Express Co.* (1938), 11 Cal.2d

283 [79 P.2d 380] the court held that the retailer could not seek reimbursement from the consumer for sales tax imposed on sales under a contract negotiated before the sales tax was passed, since that would be prohibited under the impairment of contract clause of the Federal Constitution. But that case did not involve an exempt consumer or exempt goods. Consequently, the sales tax cannot be applied to the sales of goods to the United States government even if no reimbursement is specially sought by the retailer. In *Panhandle Oil Company* v. *Knox* (1927), 277 U.S. 218, 222 [72 L. Ed. 857, 48 S.Ct. 451] the court held that it was improper to impose a sales tax on a retailer for sales made to the United States government even though that tax might not be passed on. The State of California has long recognized that the sales tax should not be imposed on retailers who sell to consumers who are exempt from taxation; e.g., sales to federal agencies (Revenue and Taxation Code Section 6381) and sales to a common carrier for use outside of the state (Revenue and Taxation Code Section 6385). This case also involves an exempt consumer so the sales tax should not be imposed on a retailer to the extent of its sales to such a consumer. In addition, that case did not involve a retailer who, as here, was suing for the benefit of his exempt consumer who had already paid the tax. In that case the retailer was seeking an exemption from the tax for himself because he was unable to obtain reimbursement from his consumers.

De Aryan v. *Akers* (1939), 12 Cal.2d 781 [87 P.2d 695] is also distinguishable since that case concerned only the question of whether the incidence of the sales tax fell upon a retailer or the consumer. Moreover, the defendant later in his brief contradicts the arguments he makes here, "Thus it is the position of defendant that, even if it were concluded that a refund were in order the refund should be payable to Diamond which would in turn make repayment

to Crocker of the excessive sales tax reimbursement it had collected" (defendant's Reply Memorandum, page 32, lines 8-11).

Since it is concluded that Diamond National Corporation has standing to sue, it is unnecessary to consider whether Crocker has standing.

IT IS ORDERED:

(1) That plaintiff Diamond National Corporation recover from the defendant State Board of Equalization the sum of $13,908.73 plus interest at the legal rate as set forth in Revenue and Taxation Code Section 6936.

(2) That plaintiff is awarded costs of suit.

(3) That plaintiff Diamond National Corporation will prepare findings and conclusions (if requested) and a form of judgment in accordance with Rule 232 of the California Rules of Court.

DATED: March 11, 1974.

VICTOR M. CAMPILONGO

Victor M. Campilongo
Judge of the Superior Court

IN THE

Superior Court of the State of California

IN AND FOR THE

City and County of San Francisco

DEPARTMENT NUMBER EIGHT

DIAMOND NATIONAL CORPORATION,
a Delaware corporation,
Plaintiff,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Defendant.

No. 602734
JUDGMENT

This cause, which was consolidated for trial of related issues only with action No. 602733 titled *Crocker Citizens National Bank* v. *State Board of Equalization,* came on regularly for trial before the above-entitled court sitting without a jury, the Honorable Victor M. Campilongo, Judge, presiding, Morrison, Foerster, Holloway, Clinton & Clark by Franklin C. Latcham, James E. Merritt and Prentiss Willson, Jr. appearing for plaintiff and Evelle J. Younger, Attorney General of the State of California by Ernest P. Goodman, Assistant Attorney General, and Philip M. Plant, Deputy Attorney General, appearing for defendant. All of the facts having been set forth in a Stipulation of Facts dated April 30, 1973 which was signed by the parties and received by the Court; and the cause having been thereafter submitted subsequent to the filing of written briefs; and the Court having considered the evidence and being fully advised in the premises and having rendered its

decision herein, findings of fact and conclusions of law not being necessary; and the Court in its Memorandum Opinion and Notice of Intended Decision filed in this cause having ordered that judgment be entered for plaintiff in accordance therewith;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff have judgment in the sum of $13,908.73 together with interest as provided in Revenue and Taxation Code Section 6936, and for its costs of suit in the sum of $39.90.

DATED: April 8, 1973.

(Entered Vol. A-465
Pg. 13, April 15, 1974)

VICTOR M. CAMPILONGO
Judge of the Superior Court

IN THE

Superior Court of the State of California

IN AND FOR THE

City and County of San Francisco

DEPARTMENT NUMBER EIGHT

CROCKER-CITIZENS NATIONAL BANK,
a national banking association,
Plaintiff,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Defendant.

NO. 602733
JUDGMENT

This cause, which was consolidated for trial of related issues only with action No. 602734 titled *Diamond National Corporation* v. *State Board of Equalization,* came on regularly for trial before the above-entitled court sitting without a jury, the Honorable Victor M. Campilongo, Judge, presiding, Morrison, Foerster, Holloway, Clinton & Clark by Franklin C. Latcham, James E. Merritt and Prentiss Willson, Jr. appearing for plaintiff and Evelle J. Younger, Attorney General of the State of California by Ernest P. Goodman, Assistant Attorney General, and Philip M. Plant, Deputy Attorney General, appearing for defendant. All of the facts having been set forth in a Stipulation of Facts dated April 30, 1973, which was signed by the parties and received by the Court; and the cause having been thereafter submitted subsequent to the filing of written briefs; and the Court having found it unnecessary to pass on said cause since the Court has entered judgment in the

sum of $13,908.73 in favor of Diamond National Corporation in action No. 602734 and it having been stipulated in paragraph 20 of the Stipulation of Facts on file herein that said refund will be paid over by Diamond National Corporation to the plaintiff herein in accordance with Revenue and Taxation Code Section 6054.5; and the Court in its Memorandum Opinion and Notice of Intended Decision filed in this cause having decided that it is unnecessary to consider whether plaintiff has standing:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action for the identical recovery of said sum of $13,908.73 has become moot and plaintiff's Complaint herein is hereby dismissed.

DATED: April 8, 1974.

VICTOR M. CAMPILONGO
Judge of the Superior Court

(Entered Vol. A-465
Pg. 13, April 15, 1974)

APPENDIX C

United States District Court
Central District of California

UNITED STATES OF AMERICA, *Plaintiff*, v. STATE BOARD OF EQUALIZATION, *Defendant*.	Civil No. 72-2568-R

FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The "Complaint for Declaratory Judgment and Refund of Taxes" was filed herein on October 30, 1972, by plaintiff United States of America (United States); the "Answer to Complaint for Declaratory Judgment and Refund of Taxes" was filed by defendant State Board of Equalization (Board) on March 20, 1973; and pursuant to the parties' "Stipulation and Order for Amendment of Complaint" filed June 7, 1973, the United States filed on June 7, 1973, its "First Amended Complaint for Declaratory Judgment and Refund of Taxes" and the Board's aforementioned Answer (filed March 20, 1973) was deemed filed in response to said First Amended Complaint.

The parties have submitted as all facts material to this case their "Stipulation of Facts" filed May 18, 1973, and "Parties Second Stipulation of Facts" filed May 24, 1974 (including all exhibits thereto); and the court has received and considered said stipulations and exhibits.

The parties having argued all the legal issues raised by the pleadings herein and under the stipulated facts herein;

and the court having given due consideration to the stipulated facts and legal arguments, makes the following:

FINDINGS OF FACT

The court adopts as its Findings of Fact

1. the "Stipulation of Facts" filed May 18, 1973; and

2. the "Parties' Second Stipulation of Facts" filed May 24, 1974.

CONCLUSIONS OF LAW

The court makes the following conclusions of law:

A. **Declaratory Judgment**

1. With respect to leases to the United States, for purposes of federal constitutional immunity, the determination of where the legal incidence of a tax falls is a federal question.

2. With respect to leases to the United States, for purposes of federal constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code (hereafter referred to as the Act) and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether the United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes the United States' immunity, under the Federal Constitution, from state taxation.

3. The sales tax provided for by the Act and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and

therefore with respect to leases to the United States, the sales tax is and was invidiously discriminatory against the United States and its lessors in violation of the Federal Constitution.

4. Leases of tangible personal property made by Sandia Corporation were leases made by Sandia as agent of the United States and, as such, were leases to the United States and were not subject to the California sales tax.

5. Sandia Corporation did not exercise rights over leased property subject to the California use tax.

6. Leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimbursable contracts with the United States and having been authorized by the United States to use GSA schedule contracts were leases made by the contractor as agent of the United States and, as such, were leases to the United States and were not subject to the California sales tax.

7. The Group B contractors (as described in the "Parties' Second Stipulation of Facts") did not exercise rights over leased property subject to the California use tax.

8. The Group C contractors (as described in the "Parties' Second Stipulation of Facts") did not exercise rights over leased property subject to the California use tax.

9. The California use tax is imposed without regard to whether the lessee is the user of the leased tangible personal property or not and, therefore, the imposition of the California use tax with respect to the use by Sandia Corporation of tangible personal property leased by Sandia on behalf of the United States or with respect to the use by contractors having cost-reimbursable contracts with the United States of tangible personal property leased pursuant to General Services Administration (GSA) schedule

contracts on behalf of the United States by such contractors having been authorized by the United States to use GSA supply schedule contracts is illegal and void because such imposition discriminates against the United States and its contractors in violation of the Federal Constitution.

B. **Money Judgment**

10. The United States is entitled to recover from the Board all taxes (state and local) under the Act paid to the Board by its lessors as listed in Exhibit 1 to the Parties' Second Stipulation for the period July 1, 1966-December 31, 1972 (except Motorola includes the first six months of 1966) for which the United States has paid tax reimbursement to its lessors as shown in Exhibit 1 to the Parties' Second Stipulation.

11. The United States is entitled to recover from the Board all taxes (state and local) under the Act paid to the Board by its lessors with respect to Sandia Corporation and for which Sandia has paid tax reimbursement as shown in Exhibit 4 to the Parties' Second Stipulation.

12. The United States is entitled to recover from the Board all taxes (state and local) under the Act paid to the Board by its lessors with respect to Group B contractors and for which the Group B contractors have paid tax reimbursement as shown in Exhibit 4 to the Parties' Second Stipulation.

13. The United States is entitled to recover from the Board all taxes (state and local) under the Act paid to the Board by its lessors with respect to Group C contractors and for which the Group C contractors have paid tax reimbursement as shown in Exhibit 4 to the Parties' Second Stipulation.

14. The United States is entitled to recover interest on the amounts determined under conclusions 10 through 13

inclusive, *supra,* at the rate of six percent from the date that the taxes were paid by the lessors to the Board or the reimbursement was paid by the United States to the lessors, whichever is later, which dates having been determined by stipulation of the parties, until the date of judgment, plus interest at six percent on the full judgment until paid.

15. Judgment will be entered containing as declarations conclusions 1 through 9, *supra;* further, judgment will be entered that the United States recover from the Board the sum of twelve million, twenty-three thousand, four hundred ninety-two dollars and eighty-six cents ($12,023,492.86) plus interest computed in accordance with conclusion 14.

Dated: September 3, 1974

(MANUEL L. REAL)

United States District Judge

United States District Court
Central District of California

UNITED STATES OF AMERICA, *Plaintiff,* v. STATE BOARD OF EQUALIZATION, *Defendant.*	Civil No. 72-2568-R

JUDGMENT

This action having come on for hearing before the Court, Honorable Manuel L. Real, District Judge, presiding, and the issues having been duly heard and findings of fact and conclusions of law having been made, and good cause having been shown therefore,

It is hereby ORDERED, ADJUDGED and DECREED that

1. With respect to leases to the United States, for purposes of federal constitutional immunity, the determination of where the legal incidence of a tax falls is a federal question.

2. With respect to leases to the United States, for purposes of federal constitutional immunity, the legal incidence of the sales tax imposed by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code and the rulings and regulations issued thereunder falls and always has fallen on the United States as lessee whether the United States is contractually obligated to reimburse its lessors for the tax or not and, therefore, the sales tax, insofar as it is imposed with respect to leases to the United States is illegal and void because it infringes

the United States' immunity, under the Federal Constitution, from state taxation.

3. The sales tax provided for by Parts 1, 1.5, and 1.6 of Division 2 of the California Revenue and Taxation Code and the rulings and regulations issued thereunder is and was imposed with respect to leases of tangible personal property to the United States but is not and was not imposed with respect to other leases, including leases to the State of California, and therefore with respect to leases to the United States, the sales tax is and was invidiously discriminatory against the United States and its lessors in violation of the Federal Constitution.

4. Leases of tangible personal property made by Sandia Corporation were leases made by Sandia as agent of the United States and, as such, were leases to the United States and were not subject to the California sales tax.

5. Sandia Corporation did not exercise rights over leased property subject to the California use tax.

6. Leases of tangible personal property made pursuant to General Services Administration (GSA) supply schedule contracts by contractors having cost-reimbursable contracts with the United States and having been authorized by the United States to use GSA schedule contracts were leases made by the contractor as agent of the United States and, as such, were leases to the United States and were not subject to the California sales tax.

7. The Group B contractors (as described in the "Parties' Second Stipulation of Facts") did not exercise rights over leased property subject to the California use tax.

8. The Group C contractors (as described in the "Parties' Second Stipulation of Facts") did not exercise

rights over leased property subject to the California use tax.

9. The California use tax is imposed without regard to whether the lessee is the user of the leased tangible personal property or not and, therefore, the imposition of the California use tax with respect to the use by Sandia Corporation of tangible personal property leased by Sandia on behalf of the United States or with respect to the use by contractors having cost-reimbursable contracts with the United States of tangible personal property leased pursuant to General Services Administration (GSA) schedule contracts on behalf of the United States by such contractors having been authorized by the United States to use GSA supply schedule contracts is illegal and void because such imposition discriminates against the United States and its contractors in violation of the Federal Constitution.

It is hereby FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff United States of America recover of the defendant State Board of Equalization of the State of California the sum of twelve million, twenty-three thousand, four hundred ninety two dollars and eighty six cents ($12,023,492.86) plus interest thereon at the rate of six percent per annum until paid.

Dated at Los Angeles, California, this 3rd day of September, 1974.

(MANUEL L. REAL)
United States District Judge

APPENDIX D

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

DIVISION TWO

DIAMOND NATIONAL CORPORATION, *Plaintiff and Respondent,* v. STATE BOARD OF EQUALIZATION, etc., *Defendant and Appellant.*	No. 35143

By the Court:

The petition for a rehearing filed in the above entitled cause is hereby denied.

(Marked Filed [Entered]
by Court Clerk
July 24, 1975)

Dated: July 24, 1975.

ROUSE
Acting P.J.

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

DIVISION TWO

CROCKER-CITIZENS NATIONAL BANK, etc.,
Plaintiff and Appellant;

v.

STATE BOARD OF EQUALIZATION, etc.,
Defendant and Respondent.

No. 35698

By the Court:

The petition for a rehearing filed in the above entitled cause is hereby denied.

(Marked Filed [Entered]
by Court Clerk
July 24, 1975)

Dated: July 24, 1975.

ROUSE

Acting P.J.

APPENDIX E

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

1ST DISTRICT, DIVISION 2, CIVIL NO. 35143, 35698

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

DIAMOND NATIONAL CORPORATION
v.
STATE BOARD OF EQUALIZATION

CROCKER CITIZENS NATIONAL BANK
v.
STATE BOARD OF EQUALIZATION

Respondent's petition for hearing DENIED.

(Marked Filed [Entered]
by Court Clerk
August 28, 1975)

WRIGHT

Chief Justice

APPENDIX F

IN THE

Court of Appeal of the State of California
First Appellate District

DIVISION TWO

DIAMOND NATIONAL CORPORATION, a Delaware corporation, *Plaintiff and Respondent,* v. STATE BOARD OF EQUALIZATION, an agency of the State of California, *Defendant and Appellant.*	1 Civil No. 35143

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Diamond National Corporation, the Plaintiff and Respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California entered in this action on June 24, 1975 (Petition for Rehearing denied by the Court of Appeal on July 24, 1975; Petition for Hearing denied by the Supreme Court of California on August 28, 1975), reversing the judgment of the Superior Court of the State of California, in and for the City and County of San Francisco.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: October 31, 1975.

(Marked Filed by Court Clerk Oct. 31, 1975)

FRANKLIN C. LATCHAM
JAMES E. MERRITT
PRENTISS WILLSON, JR.
MORRISON & FOERSTER
By

Franklin C. Latcham
Counsel for Plaintiff and Respondent

I hereby certify that on this 31st day of October, 1975, a copy of the Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid to:

Evelle J. Younger, Attorney General
Ernest P. Goodman, Assistant Attorney General
Philip M. Plant, Deputy Attorney General
State of California
6000 State Building
350 McAllister Street
San Francisco, California 94102,

counsel for Defendant and Appellant. I further certify that all parties required to be served have been served.

Franklin C. Latcham

One Post Street
San Francisco, California 94104
Counsel for Plaintiff and Respondent

IN THE

Court of Appeal of the State of California
First Appellate District

DIVISION TWO

CROCKER-CITIZENS NATIONAL BANK, a national banking association, *Plaintiff and Appellant,* v. STATE BOARD OF EQUALIZATION, an agency of the State of California, *Defendant and Respondent.*	1 Civil No. 35698

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Crocker-Citizens National Bank, the Plaintiff and Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California entered in this action on June 24, 1975 (Petition for Rehearing denied by the Court of Appeal on July 24, 1975; Petition for Hearing denied by the Supreme Court of California on August 28, 1975), affirming the judgment of the Superior Court of the State of California, in and for the City and County of San Francisco.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: October 31, 1975.

(Marked Filed by Court Clerk Oct. 31, 1975)

FRANKLIN C. LATCHAM
JAMES E. MERRITT
PRENTISS WILLSON, JR.
MORRISON & FOERSTER

By

Franklin C. Latcham
Counsel for Plaintiff and Appellant

I hereby certify that on this 31st day of October, 1975, a copy of the Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid to:

Evelle J. Younger, Attorney General
Ernest P. Goodman, Assistant Attorney General
Philip M. Plant, Deputy Attorney General
State of California
6000 State Building
350 McAllister Street
San Francisco, California 94102,

counsel for Defendant and Respondent. I further certify that all parties required to be served have been served.

Franklin C. Latcham
One Post Street
San Francisco, California 94104
Counsel for Plaintiff and Appellant

APPENDIX G

Pertinent text from California Revenue and Taxation Code, Division 2, Part 1, Sales and Use Taxes. (Effective during the period of this litigation (March 25, 1968 to June 16, 1968).) Enacted California Official Statutes ("Stats.") 1941, ch. 36, p. 532, as amended through Stats. 1967, ch. 321, 556, 693, 832, 881, 925, 963, 964, 1086, 1209, 1632.

• • •

Chapter 1. — GENERAL PROVISIONS AND DEFINITIONS.

• • •

§ 6001. **Title.** This part is known and may be cited as the "Sales and Use Tax Law."

• • •

§ 6011. **"Sales price."** "Sales price" means the total amount for which tangible personal property is sold or leased or rented, as the case may be, valued in money, whether paid in money or otherwise, • • •

§ 6012. **"Gross receipts."** "Gross receipts" mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, • • •

For purposes of the sales tax, if the retailers establish to the satisfaction of the board that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed.

• • •

Chapter 2. — THE SALES TAX.

• • •

§ 6051. **Imposition and rate of sales tax.** For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

§ 6052. **Reimbursement.** The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.

§ 6052.5. **Reimbursement schedules.** The board shall prepare sales tax reimbursement schedules showing the total amount that may be collected by the retailer from a consumer in reimbursement of the sales tax, computed on each sales price, from one cent ($0.01) to and including one hundred dollars ($100), at the 4-percent rate, and at the 5-percent rate. The schedules shall be identical with the following tables up to the amounts specified therein:

4 Percent		5 Percent	
Price	Tax	Price	Tax
.01- .12	.00	.01- .10	.00
.13- .34	.01	.11- .27	.01
.35- .59	.02	.28- .47	.02
.60- .87	.03	.48- .68	.03
		.69- .89	.04
		.90-1.09	.05

The remainder of the schedules shall show amounts of reimbursement computed by applying the applicable tax rate to the sales price, rounded off to the nearest cent by eliminating any fraction less than one-half cent and increasing any fraction of one-half cent or over to the next higher cent.

The "sales tax reimbursement schedule" shall be available for inspection and duplication or reproduction.

Each retailer who collects amounts from a consumer in reimbursement of the sales tax shall use the appropriate schedule prepared by the board in computing the amount of the reimbursement, based upon the sales price of the item sold where one item is sold, and where more than one item is sold in any one transaction, upon the sum of the aggregate sales prices of the items sold, or he shall include in the sales price of each item an amount of reimbursement computed to the nearest mill at the applicable tax rate and post a notice in his premises stating that each posted or advertised price includes reimbursement so computed. When both taxable and nontaxable items are included in the same transaction, the foregoing requirement regarding computation of tax reimbursement upon the sum of the aggregate sales prices shall apply only if the purchaser requests at the time of the sale that the computation be made in this way.

The board shall enforce the provisions of this section.

§ 6053. **Unlawful advertising.** It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it or any part thereof will be refunded. Any person violating any provision of this section is guilty of a misdemeanor.

§ 6054. **Itemization of tax reimbursement.** The board may by regulation provide that the amount collected by the retailer from the consumer in reimbursement of the tax be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sale.

§ 6054.5. **Excessive reimbursement.** When an amount represented by a person to a customer as constituting reimbursement for taxes due under this part is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid shall be returned by the person to the customer upon notification by the Board of Equalization or by the customer that such excess has been ascertained. In the event of his failure or refusal to do so, the amount so paid, if knowingly computed by the person upon an amount that is not taxable or is in excess of the taxable amount, shall constitute an obligation due from him to this State. Such obligation may be determined and collected by the board in accordance with Chapters 5 and 6 of this part. The amount so collected shall be refunded by the board to the person in accordance with Chapter 7 of this part, only upon submission of proof to the satisfaction of the board, or in the event the board denies his claim for refund, to the satisfaction of the superior court, that such amount has been returned or will be returned to the customer.

The foregoing shall not apply to an amount computed by using a schedule designed to result in reimbursement in an amount as nearly equivalent as practicable to the tax applicable to total taxable sales and to the average amount of individual taxable sales.

• • •

§ 6066. **Application for permit.** Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business. • • •

• • •

§ 6070. **Revocation of permit.** Whenever any person fails to comply with any provision of this part relating to

the sales tax or any rule or regulation of the board relating to the sales tax prescribed and adopted under this part, the board upon hearing, after giving the person 10 days' notice in writing specifying the time and place of hearing and requiring him to show cause why his permit or permits should not be revoked, may revoke or suspend any one or more of the permits held by the person. • • •

§ 6071. **Unlawful acts.** A person who engages in business as a seller in this State without a permit or permits or after a permit has been suspended, and each officer of any corporation which so engages in business, is guilty of a misdemeanor.

• • •

§ 6091. **Presumption of taxability; resale certificate.** For the purpose of the proper administration of this part and to prevent evasion of the sales tax it shall be presumed that all gross receipts are subject to the tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

§ 6092. **Effect of certificate.** The certificate relieves the seller from liability for sales tax only if taken in good faith from a person who is engaged in the business of selling tangible personal property and who holds the permit provided for in Article 2 (commencing with Section 6066) of this chapter.

• • •

Chapter 4. — EXEMPTIONS.

§ 6351. **"Exempted from the taxes imposed by this part."** "Exempted from the taxes imposed by this part," as used in this article, means, in case of the sales tax, exempted from the computation of the amount of tax imposed.

§ 6352. **Constitutional exemptions.** There are exempted from the taxes imposed by this part the gross receipts from the sale of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale of which, or the storage, use, or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State.

• • •

§ 6359. **Food products.** There are exempted from the taxes imposed by this part the gross receipts from the sale and the storage, use, or other consumption in this state of food products for human consumption. • • •

• • •

§ 6362. **Newspapers and periodicals.** There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this State, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

• • •

§ 6369. **Prescription medicines.** (a) There are exempted from the taxes imposed by this part the gross receipts from the sale, and the storage, use, or other consumption, in this State of medicines: • • •

• • •

§ 6381. **United States.** There are exempted from the computation of the amount of the sales tax the gross receipts from the sale of any tangible personal property to:

(a) The United States, its unincorporated agencies and instrumentalities;

(b) Any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States;

(c) The American National Red Cross, its chapters and branches.

This exemption does not extend to the rentals payable under a lease of tangible personal property.

• • •

Chapter 5. — DETERMINATIONS.

• • •

§ 6451. **Due date.** The taxes imposed by this part are due and payable to the board quarterly on or before the last day of the month next succeeding each quarterly period.

• • •

§ 6452. **Return.** On or before the last day of the month following each quarterly period of three months, a return for the preceding quarterly period shall be filed with the board in such form as the board may prescribe.

• • •

§ 6455. **Return periods.** The board if it deems it necessary in order to insure payment to or facilitate the collection by the State of the amount of taxes, may require returns and payment of the amount of taxes for quarterly periods other than calendar quarters depending upon the principal place of business of the seller, retailer or purchaser as the case may be, or for other than quarterly periods.

• • •

§ 6471. **Prepayment.** Upon written notification by the board, any person whose estimated measure of tax liability under this part averages seventeen thousand dollars ($17,000) or more per month, as determined by the board, shall, without regard to the measure of tax in any one month,

prepay not less than 90 percent of the amount of state tax liability for each of the first two monthly periods of each quarterly period. • • •

• • •

§ 6481. **Deficiency determination.** If the board is not satisfied with the return or returns of the tax or the amount of tax required to be paid to the State by any person, it may compute and determine the amount required to be paid upon the basis of the facts contained in the return or returns or upon the basis of any information within its possession or that may come into its possession. One or more deficiency determinations may be made of the amount due for one or for more than one period. When a business is discontinued a determination may be made at any time thereafter, within the periods specified in Section 6487, as to liability arising out of that business, irrespective of whether the determination is issued prior to the due date of the liability as otherwise specified in this part.

§ 6482. **Interest.** The amount of the determination, exclusive of penalties, shall bear interest at the rate of one-half of 1 percent per month, or fraction thereof, from the last day of the month following the quarterly period for which the amount or any portion thereof should have been returned until the date of payment.

• • •

§ 6484. **10 percent penalty.** If any part of the deficiency for which a deficiency determination is made is due to negligence or intentional disregard of this part or authorized rules and regulations, a penalty of 10 percent of the amount of the determination shall be added thereto.

§ 6485. **25 percent penalty.** If any part of the deficiency for which a deficiency determination is made is due to fraud or an intent to evade this part or authorized rules and

regulations, a penalty of 25 percent of the amount of the determination shall be added thereto.

§ 6486. **Notice of determination.** The board shall give to the retailer or person storing, using, or consuming tangible personal property written notice of its determination. • • •

• • •

§ 6561. **Petition for redetermination.** Any person against whom a determination is made under Articles 2 or 3 of this chapter or any person directly interested may petition for a redetermination within 30 days after service upon the person of notice thereof. If a petition for redetermination is not filed within the 30-day period, the determination becomes final at the expiration of the period.

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§ 6563. **Decrease or increase of determination.** The board may decrease or increase the amount of the determination before it becomes final, but the amount may be increased only if a claim for the increase is asserted by the board at or before the hearing.

• • •

§ 6565. **Due date of determination; penalty.** All determinations made by the board under Articles 2 or 3 of this chapter are due and payable at the time they become final. If they are not paid when due and payable, a penalty of 10 percent of the amount of the determination, exclusive of interest and penalties, shall be added thereto.

• • •

§ 6591. **Interest and penalties.** Any person who fails to pay any tax to the State or any amount of tax required to be collected and paid to the State, except amounts of determinations made by the board under Articles 2 or 3 of this chapter, within the time required shall pay a penalty of 10 percent of the tax or amount of the tax, in addi-

tion to the tax or amount of tax, plus interest at the rate of one-half of 1 percent per month, or fraction thereof, from the date on which the tax or the amount of tax required to be collected became due and payable to the State until the date of payment.

• • •

Chapter 6. — COLLECTION OF TAX.

§ 6701. **Security.** The board, whenever it deems it necessary to insure compliance with this part, may require any person subject thereto, to place with it such security as the board may determine. • • •

• • •

§ 6711. **Court action.** At any time within three years after any tax or any amount of tax required to be collected becomes due and payable and at any time within three years after the delinquency of any tax or any amount of tax required to be collected, or within three years after the last recording of an abstract under Section 6738 or of a certificate under Section 6757, the board may bring an action in the courts of this State, of any other state, or of the United States in the name of the people of the State of California to collect the amount delinquent together with penalties and interest.

• • •

§ 6736. **Request for judgment.** If any amount required to be paid to the State under this part is not paid when due, the board may within three years after the amount is due file in the office of the county clerk of Sacramento County, or any county, a certificate specifying the amount required to be paid, interest and penalty due, the name and address as it appears on the records of the board of the person liable, the compliance of the board with this part in relation to the determination of the amount required to be paid, and a request that judgment be entered against the person in the

amount required to be paid, together with interest and penalty as set forth in the certificate.

• • •

§ 6776. **Warrant; time of issuing.** At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, or within 10 years after the last recording of an abstract under Section 6738 or of a certificate under Section 6757, the board or its authorized representative may issue a warrant for the enforcement of any liens and for the collection of any amount required to be paid to the state under this part. • • •

• • •

§ 6796. **Seizure and sale.** At any time within three years after any person is delinquent in the payment of any amount, the board may forthwith collect the amount in the following manner: The board shall seize any property, real or personal, of the person and sell the property, or a sufficient part of it, at public auction to pay the amount due together with any interest or penalties imposed for the delinquency and any costs incurred on account of the seizure and sale.

Any seizure made to collect a sales tax due shall be only of property of the retailer not exempt from execution under the provisions of the Code of Civil Procedure.

• • •

Chapter 7. — OVERPAYMENTS AND REFUNDS.

§ 6901. **Credits and refunds.** If the board determines that any amount, penalty, or interest has been paid more than once or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of the amount legally due and the person from whom it was collected or by

whom paid. If approved by the State Board of Control the excess amount collected or paid shall be credited by the board on any amounts then due and payable from the person from whom the excess amount was collected or by whom it was paid under this part, and the balance shall be refunded to the person, or his successors, administrators, or executors.

In the case, however, of a determination by the board that an amount not exceeding one thousand dollars ($1,000) was not required to be paid under this part, the board without obtaining approval of the State Board of Control may credit the amount on any amounts then due and payable under this part from the person by whom the amount was paid and may refund the balance to the person or his successors, administrators, or executors. • • •

• • •

§ 6902. **Claim; limitation period.** (a) Except as provided in subdivision (b) no refund shall be approved by the board after three years from the last day of the month following the close of the quarterly period for which the overpayment was made, or, with respect to determinations made under Article 2, 3 or 4 of Chapter 5 of this part, after six months from the date the determinations become final, or after six months from the date of overpayment, whichever period expires the later, unless a claim therefor is filed with the board within such period. No credit shall be approved by the board after the expiration of such period unless a claim for credit is filed with the board within such period, or unless the credit relates to a period for which a waiver is given pursuant to Section 6488.

(b) A refund may be approved by the board for any period for which a waiver is given under Section 6488 if

a claim therefor is filed with the board before the expiration of the period agreed upon.

• • •

§ 6904. **Form and content of claim.** Every claim shall be in writing and shall state the specific grounds upon which the claim is founded.

§ 6905. **Effect of failure to file claim.** Failure to file a claim within the time prescribed in this article constitutes a waiver of any demand against the State on account of overpayment.

§ 6906. **Notice of action on claim.** Within 30 days after disallowing any claim in whole or in part the board shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination.

§ 6907. **Interest.** Interest shall be paid upon any overpayment of any amount of tax at the rate of one-half of 1 percent per month from the last day of the calendar month following the quarterly period for which the overpayment was made; • • •

• • •

§ 6932. **Necessity of refund claim.** No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed pursuant to Article 1 of this chapter.

§ 6933. **Action for refund; limitation.** Within 90 days after the mailing of the notice of the board's action upon a claim filed pursuant to Article 1 of this chapter, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this State in which the Attorney General has an office for the recovery of the whole

or any part of the amount with respect to which the claim has been disallowed.

Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

• • •

§ 6935. **Disposition of amount of judgment.** If judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any sales or use tax or amount of use tax due and payable from the plaintiff. The balance of the judgment shall be refunded to the plaintiff.

§ 6936. **Interest.** In any judgment, interest shall be allowed at the rate of 6 percent per annum upon the amount found to have been illegally collected from the date of payment of the amount to the date of allowance of credit on account of the judgment or to a date preceding the date of the refund warrant by not more than 30 days, the date to be determined by the board.

• • •

§ 6981. **Cancellation of determinations.** If any amount in excess of one thousand dollars ($1,000) has been illegally determined either by the person filing the return or by the board, the board shall set forth that fact in its records and certify to the State Board of Control the amount determined to be in excess of the amount legally due and the person against whom the determination was made. If the State Board of Control approves, it shall authorize the cancellation of the amount upon the records of the board. If an amount not exceeding one thousand dollars ($1,000), has been illegally determined either by the person filing a return or by the board, the board without certifying this fact to the State Board of Control shall authorize the cancellation of the amount upon the records of the board.

Chapter 8. — ADMINISTRATION.

§ 7051. **Enforcement by board; rules and regulations.** The board shall enforce the provisions of this part and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part. The board may prescribe the extent to which any ruling or regulation shall be applied without retroactive effect.

• • •

Chapter 9. — DISPOSITION OF PROCEEDS.

§ 7101. **Retail Sales Tax Fund.** All fees, taxes, interest, and penalties, imposed and all amounts of tax required to be paid to the State under this part shall be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California. The board shall transmit the payments to the State Treasurer to be deposited in the State Treasury to the cred[illegible] the Retail Sales Tax Fund.

§ 7102. **Disposition of fund.** The money in the fund shall, upon order of the Controller, be drawn therefrom for refunds under this part or be transferred to the General Fund of the State.

• • •

Chapter 10. — VIOLATIONS.

§ 7151. **Criminal penalties.** Any retailer or other person who fails or refuses to furnish any return required to be made, or who fails or refuses to furnish a supplemental return or other data required by the board, is guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each offense.

§ 7152. **Same.** Any person required to make, render, sign, or verify any report who makes any false or fraudul-

ent return, with intent to defeat or evade the determination of an amount due required by law to be made is guilty of a misdemeanor. He shall for each offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5,000), or be imprisoned for not exceeding one year in the county jail, or be subject to both the fine and imprisonment in the discretion of the court.

§ 7153. **Violation of law.** Any violation of this part, except as otherwise provided, is a misdemeanor.

§ 7154. **Statute of Limitations.** Any prosecution for violation of any of the penal provisions of this part shall be instituted within three years after the commission of the offense.

APPENDIX H

United States Code, Title 12, Sec. 548
(Effective during the period in this litigation
(March 25, 1968 to June 16, 1968))

TITLE 12.—BANKS AND BANKING

Chapter 4. — TAXATION.

NATIONAL BANK SHARES

548. *State taxation.* — The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located within the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State, shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in

any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as heretofore in force shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. § 5219; Mar. 4, 1923, c. 267, 42 Stat. 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.)

(2) *Amendments.* 12 U.S. Code Sec. 548 was amended by Public Law 91-156, 83 Stat. 434 (December 24, 1969), effective from that date, and incorporating certain changes effective January 1, 1972. Public Law 92-213, 85 Stat. 775, approved December 22, 1971, postponed the effective date of the January 1, 1972 amendments until January 1, 1973. None of these amendments affect the period in issue in this case.

APPENDIX I

(State Board of Equalization Regulation 1614, Title 18, California Administrative Code Section 1614, February 17, 1970, effective March 22, 1970)

Reg. 1614. **Sales to the United States and Its Instrumentalities.**—(a) **Generally.** Sales tax does not apply to sales, other than leases, to:

(1) The United States, its unincorporated agencies and instrumentalities.

(2) Any incorporated agency or instrumentality of the United States wholly owned by either the United States, or by a corporation wholly owned by the United States.

(3) The American National Red Cross, its chapter and branches.

Application of the use tax to the storage, use, or other consumption of tangible personal property by these entities is prohibited by the United States Constitution.

Sales tax does apply to the rentals paid under a lease of tangible personal property to any of the agencies or entities named above.

Where payment for tangible personal property sold or consumed in this state is made partly by the United States or its instrumentalities and partly by nonexempt persons, the payment is exempt to extent of the United States' share provided it is made directly to the vendor by the United States. If the nonexempt party makes full payment and then seeks reimbursement from the United States, the entire amount is taxable even though the United States may reimburse him in full or in part.

(b) **Incorporated Instrumentalities.**—Sales tax applies to sales to such corporations as national banks, joint-stock

land banks, federal reserve banks, federal savings and loan associations, federal credit unions, and federal land banks, which are not wholly owned by the United States, or which are not wholly owned by other corporations wholly owned by the United States.

(c) **Army and Air Force Exchange Services, Navy Exchanges, Coast Guard Exchanges, Open Messes, and Officers' Messes.**—Army and air force exchange services, navy exchanges, coast guard exchanges, open messes, and officers' messes, established pursuant to regulations of the appropriate branch of the armed services are instrumentalities of the United States, and tax does not apply to sales, other than leases, to these organizations.

Tax applies to sales to persons in the armed services of the United States, notwithstanding the circumstances that the merchandise may be billed through any army or air force exchange service, navy exchange, coast guard exchange, or similar organization.

(d) **Company and Other Unit Funds.**—Tax does not apply to sales, other than leases, to the armed services of merchandise purchased with unit and similar funds (company, troop, hospital, recreation, welfare, etc.) where the expenditures are made in accordance with appropriate regulations of the armed services for the general benefit of armed services personnel.

(e) **Civilian Welfare Funds.**—Civilian welfare funds are established and administered under armed services regulations under which post restaurants are also administered. Both are nonappropriated fund activities and are unincorporated governmental instrumentalities. Accordingly, sales tax does not apply to sales made to such organizations properly conducted and operated at military installations in this state in accordance with appropriate regulations.

Any seller to such organizations claiming a transaction as exempt from sales tax must obtain from the purchaser a certificate similar to the following:

This is to certify that the .....
Name of Fund

located at ..... is a
Name of Installation

nonappropriated fund activity located at a military installation of the United States in the State of California and is conducted and operated in accordance with armed services regulations established for such activities. As such, sales to this nonappropriated civilian welfare fund are exempt from California state and state-administered local sales taxes.

.....
Signature

.....
Rank

.....
Commanding Officer or Representative

(f) **The Selective Service System.**—Tax does not apply to receipts from sales, other than leases, to State Procurement Officers for selective service authorized by selective service regulations.

(g) **Supporting Documents.**—Any seller claiming a transaction as exempt from tax under section 6381 must obtain from the purchaser, and retain, a government purchase order or a government remittance advice to support his claim. *(Regulation 1614: Adopted as of January 1, 1945, as a restatement of previous rulings; amended August 2, 1965, applicable on and after August 1, 1965; amended and renumbered from ruling no. 54 (Cal. Admin. Code 2014) February 17, 1970, effective March 22, 1970.)*

APPENDIX J

Excerpt from the Clerk's Transcript in Diamond National case before the California Court of Appeal, pp. 33-35, being paragraphs 22-23, Stipulation of Facts.

22. It is and has been for many years, including the period here involved, the general practice and custom of retailers selling tangible personal property in California to separately state "sales tax reimbursement" in setting forth the total amounts charged their customers including national banks, with respect to purchases of tangible personal property and it is the general practice of California customers, including national banks, to pay "sales tax reimbursement" as part of the total amount paid for goods. Regulation 1700 of Title 18 of the California Administrative Code (formerly section 2100 of Title 18) sets forth two basic procedures in this regard. The regulation so far as here relevant provides:

> [1] "Each retailer who collects an amount from a consumer in reimbursement of the sales tax upon gross receipts up to one hundred dollars ($100), inclusive, shall compute the amount of reimbursement by reference to schedules prepared by the board pursuant to section 6052.5 of the Sales and Use Tax Law. Schedules are available for the various applicable rates. Schedules at the curent applicable rates are set out in full as appendixes to this regulation."
>
> [2] "As an alternative procedure, a retailer may include in the sales price of each item an amount of reimbursement computed to the nearest mill at the applicable tax rate, but he must display conspicuously in his premises a notice that each posted or adver-

tised price includes tax reimbursement so computed. This notice should read substantially as follows:

> All prices of taxable items include reimbursement for sales taxes computed to the nearest mill."

It is to the economic advantage of a retailer to follow the procedures set forth above in order to insure his excluding from the gross receipts to be included in the measure of the tax, the "sales tax reimbursement" which is added to the selling price in accordance with Regulation 1700. If one of these procedures is not followed, i.e., separate statement of "sales tax reimbursement" or displaying a notice that each posted or advertised price includes "sales tax reimbursement," then it is the position of the Board of Equalization that the total amount collected by the retailer constitutes the measure of the sales tax unless the retailer can otherwise establish to the satisfaction of the Board that the sales tax has not been absorbed.

23. It is the general practice and custom of retailers selling tangible personal property in California to national banks to follow the procedure which is set forth in the first paragraph of Regulation 1700 set forth above and for convenience of identification numbered 1, and therefore to separately state the amount of "sales tax reimbursement" in setting forth the amounts charged the banks.

Supreme Court, U. S.
FILED
MAR 7 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1038

DIAMOND NATIONAL CORPORATION,
a Delaware corporation,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee,

CROCKER CITIZENS NATIONAL BANK,
a National banking association,
Appellant,

vs.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two

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Motion to Dismiss or Affirm

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On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two

---

Motion to Dismiss or Affirm

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss these appeals or to affirm the judgment of the

Court of Appeal, First Appellate District of the State of California.

There is no substantial federal question presented as a basis of jurisdiction in this Court inasmuch as the questions have been foreclosed by previous decisions of this Court. The decision of the Court of Appeal correctly applies the standards enunciated by this Court in *First Agricultural Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339 (1968) (hereinafter sometimes referred to as *Berkshire*); *Gurley v. Rhoden,* 421 U.S. 200 (1975) and *United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975).

SUMMARY OF CASE

The California sales tax (California Revenue and Taxation Code Section 6001, et seq.) is imposed on retailers for the privilege of selling tangible personal property at retail, measured by the retailer's gross receipts. The statute imposing the California sales tax has been consistently construed, applied and administered for almost 40 years as a pure "vendor" tax which creates *no* obligation of any kind on the consumer and thus gives the retailer absolutely no right (let alone any duty) to pass the sales tax on to his purchaser. The sole issue presented by this case is whether this California sales tax is to be regarded as being imposed on the purchaser as a matter of federal law when the purchaser is a federal instrumentality.

Contrary to the statement at page 2 of the Jurisdictional Statement, the Court of Appeal did not conclude that the California sales tax was collected from the purchaser pursuant to the provision of the California law. Rather, the Court of Appeal concluded that no federal right was violated when Crocker, a national bank, contracted to pay sales tax reimbursement as part of the purchase price for

supplies it acquired from Diamond. The Court of Appeal concluded that since under the California sales tax law the retailer has no rights against the purchaser and it is optional with the parties as to whether they wished to contractually add sales tax reimbursement to the sales price, the legal incidence of the sales tax is on the retailer, Diamond.

For over thirty years California national banks acquiesced in the proposition that the legal incidence of the sales tax was on the retailer. *Western Lithograph Co. v. State Board of Equalization,* 11 Cal.2d 156, 78 P.2d 731 (1938). The present challenge to the California tax is based on their erroneous belief that this Court in *Berkshire,* supra, adopted a new standard to determine the legal incidence of a tax.

A review of this Court's decisions, particularly *First Agricultural Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339 (1968), *Gurley v. Rhoden,* 421 U.S. 200 (1975), and *United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975) demonstrates that the California sales tax was validly applied in the instant case to the gross receipts of Diamond arising from its sales to Crocker National Bank and that appellants simply misunderstand the criteria utilized by this Court in the cases mentioned above. In all of the listed cases it was made clear that the legal incidence of an excise tax turns upon whether there was a mandatory requirement that the tax be passed on to the purchaser. No such mandatory pass on requirement exists under California law.[1] Therefore, the incidence of the tax remains on the retailer.

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1. Cases collected in *Ainsworth v. Bryant,* 34 Cal.2d 465 at 473-474, 211 P.2d 564 at 569 (1949) demonstrate that the California sales tax has been consistently construed and applied as a purely "vendor" type tax giving the retailer no rights against the purchaser.

The same decisions of this Court make it clear that it is not significant as far as the legal incidence is concerned that a vendor may choose to shift the *economic burden* of the tax to a federal instrumentality. Rather, in order to preserve federal supremacy, this Court has stricken down only those state taxes which the state by law or regulations *require* be passed on to a federal instrumentality, i. e. which give the retailer a state sanctioned right to require payment of the tax by the purchaser.[2] It is only under such circumstances that there is state action directly affecting the federal instrumentality and thus a prohibited state encroachment on federal sovereignty. The fact that a retailer, such as Diamond, and a purchasing national bank, such as Crocker, agree that the retailer, in order to cover his costs, may include as part of his selling price reimbursement for his sales tax liability has been stated by this Court to be not violative of the principle of federal supremacy. *Berkshire,* supra, at pages 346, 347.

About forty years ago the California Supreme Court, by recognizing that the legal incidence of the sales tax is on the vendor alone, held unconstitutional and thus eliminated from the California sales tax law a provision which would have allowed a retailer to pass on the California sales tax without the consent of the purchasers as to contracts entered into prior to the enactment of the Sales Tax Act. *National Ice, etc. Co. v. Pacific Fruit Express*, 11 Cal. 2d 283, 79 P.2d 380 (1938)[3]

2. The federal district court in *Meyer Const. Co. v. Corbett,* 7 Fed. Supp. 616, 618 (1934), recognized this when it found that the California Retail Sales Act was a tax on the retailer noting: "The Retail Sales Tax Act creates the relationship of sovereign power and taxpayer between the state the retailer, and not between the state and the consumer."

3. This case shows how the California sales tax actually operates. The California Supreme Court held unconstitutional section 4 of the California Sales Tax Act, which would have allowed sales tax reimbursement to be added to contracts entered into prior to the enactment of the California Sales Tax Act. The Court concluded that since the Legislature intended the sales tax to be imposed on retailers and not purchasers, sales tax reimbursement could not be added to the selling price in the absence of the purchaser's consent. The Court held section 4 severable so that the Sales Tax Act was valid despite the elimination of that section.

Under the California sales tax there simply is no statutory requirement that makes the purchaser liable for the tax or gives the retailer any rights against the purchaser. The purchasers' liabilities, if any, are contractual. This fact was also recognized forty years ago by the Internal Revenue Department of the United States and the Controller General of the United States in ruling that the legal incidence of the California sales tax for federal purposes was on the retailer and not the purchaser. See Appendix A and Appendix B hereto.

The Solicitor General has filed an amicus curiae brief urging that this Court note probable jurisdiction. It points out that a case now pending in the Court of Appeal for the Ninth Circuit (*United States v. State Board of Equalization,* CA 9 No. 74-3360) presents the same issue with respect to the application of the California sales tax to lessors to the federal government. The Board agrees that the same issue is presented in both cases.[4] Appellants also refer to this pending Ninth Circuit appeal in their Jurisdictional Statement. As the Solicitor General appears to adopt appellants' line of argument in its memorandum, appellee's response thereto will be incorporated into this document.

Appellants and amicus curiae have both failed to accurately state the issue, the facts or the applicable California

4. The federal government has also raised the issue that even though equal burdens are imposed with respect to all leases of tangible personal property in California by virtue of complementary taxes, nevertheless, there is "invideous discrimination" against the federal government.

law in their briefs. Thus, the statement of questions presented by appellants' Jurisdictional Statement (hereinafter "J.S.") pages 3 and 4, is misleading because it suggests that the question of legal incidence is a "subsidiary question," "among others". This is the only question. No one asserts any unconstitutionality except on the contention that the legal incidence of the sales tax is on the purchaser. Further, appellants mischaracterize the California sales tax, calling it a tax "applied to sales". It is not. The California sales tax is a tax on the retailer for the privilege of engaging in business, measured by his gross receipts from sales. (California Rev. & Tax. Code § 6051).

Amicus curiae also misstates the question presented. Amicus curiae, rather than presenting any cogent argument seems content to merely keep quoting out of context portions of one sentence of the California sales tax law while refusing to recognize that the quoted language has for almost forty years been interpreted and applied consistently by California and federal courts as well as by state and federal administrative agencies to mean something very different from what amicus curiae hopes this Court will infer it to mean. (Amicus curiae brief, pages 2 and 3). The refusal of amicus curiae in this regard is particularly curious in light of the fact that it stipulated to this consistent interpretation of the California sales tax as purely a "vendor" type tax in the case of *United States v. State Board of Equalization* with which it is most immediately concerned.[5]

5. This stipulation of facts (without the exhibits thereto) is set forth as Appendix C hereto. Paragraph 16(a) of the stipulation states:

> "16. Under the California Sales and Use Tax Law:
>
> "(a) Since 1933, sales tax is imposed on a seller for the privilege of selling tangible personal property in California at retail; the legal obligation to pay the sales tax is on the seller; the buyer has no obligation to or rights against the State of California; a sales tax may be lawfully imposed even though the user be exempt from sales and use tax; *the seller has no rights (except those created by contract between seller and buyer) to reimburse to himself or otherwise recover from the buyer the amounts of sales tax paid by the seller;* it is the prevailing (but not uniform) practice, however, for the buyer and seller to separately state and collect sales tax reimbursement in their sales agreement; . . ." (Appendix A, page 4, ¶ 16(a).) (emphasis added)

It is further stipulated in Paragraph 17 that the foregoing statement "represents a consistent and repeated forty year interpretation of the sales tax administrator, California Legislature, California Attorney General and state and federal courts."

THE JURISDICTIONAL STATEMENT DOES NOT ACCURATELY REFLECT THE STIPULATED FACTS

The facts as stated in the Jurisdictional Statement fail to accurately reflect the Stipulation of Facts agreed to by the parties in several vital particulars. In this regard, it is most significant that appellants avoid mention of the contractual basis for the payment of sums here in issue. It was expressly stipulated that:

> "Crocker and Diamond entered into a contract whereby Diamond would furnish supplies needed by Crocker at a stated price per item. [Stip. Par. 7, C.T. 27] • • • •
>
> "At the time of the sales transactions here involved and for many years prior thereto, it was understood and agreed between Crocker and Diamond that the prices stated by Diamond were exclusive of 'sales tax reimbursement' which would be added to the stated price Crocker would pay Diamond for the merchandise." (Stip. Par. 10, C.T. 29.)

This is so since under California law sales tax reimbursement is a matter of voluntary contractual arrangement between buyer and seller.

In addition, appellants' assertions are at variance with Regulation 1700 of the Board of Equalization respecting sales tax reimbursement. (California Administrative Code section 1700 of Title 18). The express language of this regulation is set forth in the stipulation of facts (Stip. 22, C.T. 33, 34) and directly contradicts appellants' assertion that California retailers are "required to separately state and collect the tax." J.S. 9.[6] Thus, Regulation 1700 evidences the optional nature of the California reimbursement procedure in general and of separate statement of reimbursement in particular and recognizes that a retailer need not separately state the amount of sales tax reimbursement.

As will be discussed more fully herein, there is no requirement under California law that the retailer collect any sales tax reimbursement from the purchasers.

In addition, it was expressly stipulated that the $13,911.94 here in controversy was to be referred to as "sales tax reimbursement."[7] (Stip. 9, C.T. 28, 29). The Jurisdictional Statement at page 5, although purporting to reflect the Stipulation of Facts, conveniently omits the word "reimbursement" in its description of the payments in controversy thereby begging the ultimate issue presented herein.

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6. Paragraph 22 of the Stipulation of Facts is set forth in Appendix J of the Jurisdictional Statement.

7. In that regard it was stipulated that the designation of such sum as "sales tax reimbursement" was not intended to resolve the legal nature of these amounts added to stated price since this was a legal issue in the case. (C.T. 29).

ARGUMENT

The Question Presented Herein, Having Been Resolved by Prior Decisions of This Court, Is Neither Substantial Nor Important

A. THERE IS NO MANDATORY PASS ON REQUIREMENT UNDER THE CALIFORNIA SALES TAX LAW.

This Court has stated that in a matter involving federal rights, it will look to the operation and effect given to a state statute. *St. Louis S.W. Ry Co. v. Arkansas,* 235 U.S. 350, 362 (1914). For forty years the actual operation of the California sales tax law has been in accordance with the construction placed upon it by the California appellate courts and by the State Board of Equalization, the agency charged with its enforcement, i.e. that it is strictly a "vendor type" sales tax creating no rights against purchasers.

It is clear that the California sales tax is a privilege tax upon a retailer measured by gross receipts (Rev. & Tax. Code § 6051); and that only the retailer has any duty to make payments to or receive refunds from the State of California. (Rev. & Tax. Code § 6066 [permits], § 6452 [returns], §§ 6481, 6511 [determinations], § 6937 [nonassignability]

Were there nothing else, there would be no litigation. However, the California sales tax statute does also provide "The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done" (§ 6052) and "It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it or any part thereof will be refunded Any person violating any provision of this section is guilty of a misdemeanor." (§ 6053.)

Appellants and amicus curiae argue that these two sections create a right in the seller to pass the legal obligation on to his customer and a corresponding right in the retailer to collect from his customer the amount of sales taxes he is required to pay. Such contentions were forcefully made almost forty years ago and a number of times since then. On each occasion, these contentions were rejected by the California courts. See e.g., *Western Lithograph Co. v. State Bd. of Equalization,* 11 Cal.2d 156, 162, 78 P.2d 731, (1938), *National Ice, etc. Co. v. Pacific Fruit Express, supra; Pac. Coast Eng. Co. v. State of California,* 111 Cal.App.2d 31, 34, 244 P.2d 21 (1952), *Coast Elevator Co. v. State Bd. of Equalization,* 44 Cal.App.3d 576, 588, 118 Cal.Rptr. 818 (1975).

Section 6053 has been held to pertain solely to advertising practices, and does not in any way effect the rights or obligations of the buyer or seller under a sales agreement. *See DeAryan v. Akers,* 12 Cal. 2d 781, 787, 87 P.2d 695 (1939); *Pac. Coast Eng. Co. v. State of California,* 111 Cal. App. 2d 31, 35, 244 P.2d 21 (1952). Specifically neither sections 6052 nor 6053 give the retailer a right of action against the consumer who has no obligation except as he agrees to reimburse the tax as part of the sales price. *Clary v. Basalt Rock Co.,* 99 Cal. App. 2d 458, 461, 222 P.2d 24 (1950).

Moreover, in 1938, the California Supreme Court rejected the contention advocated by appellants and amicus curiae that it is the intention of the Legislature that in reality the consumer should pay the sales tax. See *National Ice etc. Co. v. Pacific Fruit Express,* 11 Cal.2d 283, 288-89, 79 P.2d 380 (1938), discussed above.

Appellants also fail to discuss or even mention the only final Federal Court decision which construed the legal incidence of the California sales tax. In 1934, the Federal District Court in *Meyer Construction Company v. Corbett, supra,* 7 Fed.Supp. 616 (1934) considered and rejected the same argument made by appellants herein, i.e. that the provision in section 6052 that "The tax hereby imposed shall be collected from the retailer insofar as it can be done" means that the tax is on the purchaser. The federal court recognized that this provision then found in section 8½ of the Sales Tax Act merely "authorized or granted permission to the retailer to reimburse himself for the tax which he must pay to the state to be allowed to sell tangible personal property at retail." 7 Fed.Supp. at page 618. The Court further held:

> "The Retail Sales Tax Act creates the relationship of sovereign power and taxpayer between the state and the retailer, and not between the state and the consumer . . ." 7 Fed.Supp. at page 618.

Moreover, federal governmental agencies for thirty-five years have recognized that the legal incidence of the California sales tax is on the retailer rather than the consumer. Thus, shortly after the passage of the California Retail Sales Tax Act of 1933, the Internal Revenue Service ruled in Revenue Ruling XII-47 6518, IT 2733, that the legal incidence of the California sales tax was on the vendor so that the retailer alone could deduct the tax for federal income tax purposes. A copy of this ruling is attached as Appendix A hereto.[8] Then in Decisions of the Controller A 88689 promulgated on January 31, 1942 (a copy of which is at-

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8. This ruling was handed down prior to the enactment of section 122 of the Revenue Act of 1942 which expressly made sales taxes imposed on the retailer deductible by the consumer. At this earlier time, consumers could not claim such a deduction if, as in California, the tax was imposed upon and paid by the retailer and not the consumer.

tached to this brief as Appendix B) the United States Controller General clearly recognized that the California sales tax was on the retailer with the result that it was applicable to items purchased as necessary for the proper administration of the unemployment compensation laws and could be included in grants for that purpose.

In sum, under an established history of state and federal judicial and administrative interpretation of the California sales tax law, it has uniformly been held that the California sales tax is imposed upon the retailer for the privilege of engaging in business as such; that the purchaser has no statutory obligation to either the state or the retailer, that the retailer has no statutory right or obligation to collect sales tax or sales tax reimbursement from the purchaser, and that it is merely optional with the parties whether or not to agree by contract to provide for payment of sales tax reimbursement by the purchaser.

B. THE JURISDICTIONAL STATEMENT IGNORES THE FACT THAT THE CALIFORNIA SALES TAX AND THE MASSACHUSETTS SALES TAX ARE FUNDAMENTALLY DIFFERENT INSOFAR AS THE FORMER MERELY PERMITS OPTIONAL SALES TAX REIMBURSEMENT WHEREAS THE LATTER REQUIRES THAT THE SALES TAX BE PASSED ON TO THE PURCHASER; THIS COURT'S DECISIONS MAKE CLEAR THIS DISTINCTION IS CONTROLLING WITH REGARD TO LEGAL INCIDENCE.

Although placing primary reliance on the *Berkshire* case, *supra,* the Jurisdictional Statement fails to reflect that drafters of the Massachusetts Sales Tax (which was enacted in 1966) recognized that there was a fundamental difference between their statute (involved in *Berkshire*) and the California statute and that this difference might well preclude the application of the Massachusetts tax to sales to national banks.

The Massachusetts Supreme Court in its decision in *First Agricultural Bank v. State Tax Commission,* 229 NE 2d 245, at 249 (1967) recognized that the Massachusetts Sales Tax

was not a vendor type sales tax like that of the California but was instead a hybrid type sales tax.[9] In this regard, the Massachusetts Supreme Court at page 249 cited with approval an article by Mr. John Dane, Jr. in 51 Mass Law Quarterly 241 in which this distinction was discussed.[10]

In the course of the article Mr. Dane expressed concern over some of the consequences which would flow from the fundamental difference between the purely "vendor type" sales tax (such as exists in California) under which obtaining reimbursement from the purchaser is optional with the retailer and the "hybrid type" Massachusetts sales tax under which the vendor registers and pays the tax over to the State but is required to shift the tax onto the consumer and collect it from him in accordance with the bracket system. Mr. Dane recognized that because of the mandatory pass on requirement in the Massachusetts hybrid type statute there would be problems in taxing national banks which did not arise under the California vendor type statute.[11] 51 Mass. Law Quarterly at 246 to 248.

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9. While the California sales tax is a privilege tax imposed on a retailer measured by his gross receipts from sales, section 1 of the Massachusetts sales tax law before this Court in Berkshire stated "a tax on retail sales is imposed in accordance with the following subsections: . . ."

10. Mr. Dane was certainly knowledgeable with respect to this matter. At the beginning of the article referred to above his qualifications are described as follows: "Former member and Chairman of the Massachusetts Tax Commission. Mr. Dane served as Special Consultant to Governor Volpe in connection with the preparation of sales tax legislation."

11. At page 265 of the Massachusetts Law Quarterly Article, Mr. Dane stated "As explained above, the Massachusetts tax is a hybrid tax since it is initially imposed on the vendor but shifting to the consumer is mandatory. It cannot be constitutionally imposed on sales to the federal government." The distinction between the California vendor type tax and the Massachusetts hybrid type tax has also been recognized by Mr. John Due, the foremost authority on the sales tax, at page 25 of his book *State and Local Sales Taxation* (1972).

Thus there is a very fundamental difference between the California sales tax and the Massachusetts sales tax, i.e. there is a mandatory pass on requirement under the Massachusetts law which results in the imposition by state action of tax liability on the purchaser. Under the California statute it is merely optional with the retailer whether or not he chooses to obtain sales tax reimbursement by contracting therefore with purchasers.

In the next section hereof we will demonstrate that this Court in *Berkshire* recognized the distinction between a hybrid type tax and a vendor type tax discussed above since it regarded as controlling with regard to legal incidence the mandatory pass on requirement of the Massachusetts statute which has no equivalent under California law. This Court also recognized in *Berkshire* that a vendor type tax could validly apply to sales to federal instrumentalities.

C. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT.

In advancing the contention that the *Berkshire* case, *supra,* supports the conclusion that the California sales tax could not validly apply to Diamond's gross receipt from sales to Crocker National Bank, appellants have ignored the standards set forth by this Court in that case. The Court, in addressing the question of whether the legal incidence of the Massachusetts tax was on the purchaser, stated that if the tax was upon vendors who sell tangible property to the bank, "the bank cannot object if a particular vendor decides to pass the burden of the tax on to it through an increase in price. But if this is not true, and if the tax is on the bank as a purchaser, then because it is a national bank, appellant is exempt under 12 U.S.C. § 548." (392 U.S. 339, 347).

This Court then held that "a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence on the purchaser." This Court, in concluding that there was a clear requirement that the Massachusetts sales tax be passed on the purchaser, italicized as set forth below various provisions of subsection 3 of the Massachusetts sales tax law stating that: "Reimbursement for the tax *shall be paid by the purchaser* to vendor and each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section . . .; and such tax shall be a debt from the purchaser to the vendor. . . .*"

The California sales tax law contains no such provisions as those italicized above which this Court regarded as controlling in the *Berkshire* case. Thus, it is clear that appellants' contention that the *Berkshire* rule supports its position herein is devoid of merit.

Several cases decided after *Berkshire* are of significance in reaffirming the standards for evaluating the validity of a tax which is challenged as violating a federal right. On May 12, 1975, this Court rendered its decision in *Gurley v. Rhoden* 421 U.S. 200 (1975).[12] In the *Gurley* case this Court acknowledged the deference to be given to a state court's interpretation of the legal incidence of state taxes. 421 U.S. 200 at 208.

The best appellants can do to escape the impact of the *Gurley* case in this regard is to suggest that the standard it sets forth does not apply if a federal exemption from state taxes is involved. Suffice it to say that the distinction which appellants seek to make does not find support in the

12. In the *Gurley* case the Court considered the legal incidence of both the federal excise tax on gasoline and the Mississippi excise tax on gasoline.

Gurley case. Moreover, this court in *Colorado National Bank v. Bedford,* 310 U.S. 41, at 52, (1940) enunciated this same standard in a case involving state taxation affecting national banks.

This Court in *Gurley v. Rhoden, supra,* in making its determination with respect to the incidence of the federal excise tax, rejected contentions similar to those raised by appellants herein. Thus the Court dismissed as irrelevant the fact that it was contemplated that the economic burden of the tax would be passed on to the purchasers. 421 U.S. 200 at 204. This is clearly consistent with *Berkshire* where this Court said that if it were true that the tax was on the vendor "the bank cannot object if a particular vendor decides to pass the burden of the tax on to it through an increased price . . ." 392 U.S. 339 at 346, 347.

Highly significant is the manner in which this Court in *Gurley,* in holding the legal incidence of the federal gasoline tax was on the producer, distinguished the *Berkshire* case on the basis of the mandatory pass on requirement under the Massachusetts sales tax law which resulted in making the vendee liable for payment. 421 U.S. 200 at 206.

About three weeks after the decision in *Gurley v. Rhoden,* in *United States v. Mississippi Tax Commission, supra,* this Court struck down a Mississippi markup tax on liquor sold to military installations when the failure of the distiller to pass on the tax could result in criminal penalities and might also result in forfeiture of its license to operate in Mississippi. In this decision this Court cited the *Berkshire* case as involving a mandatory pass on requirement. In this latter Mississippi case, the State action, i.e., the regulation, violated the principle of federal supremacy by requiring that a state tax be passed on to a federal instrumentality.

In view of these later decisions of this Court which cite and discuss the *Berkshire* case, *supra,* it seems too clear for argument that as a matter of federal law the legal incidence of an excise tax payable by a vendor does not fall on a purchaser unless there is a mandatory requirement that the tax be passed on to such purchaser.

D. THE ARGUMENTS OF APPELLANTS ARE WITHOUT MERIT.

In the prior discussion we have shown the fundamental differences between the vendor type sales tax imposed by California which is only on the vendor and the hybrid type Massachusetts sales tax with its mandatory pass on requirement which constitutes state action affecting the liability of the purchaser. We have also demonstrated that the test of legal incidence suggested by appellants is drastically different from the actual test of legal incidence of a tax enunciated in the *Berkshire* and the subsequent decisions in *Gurley v. Rhoden, supra,* and *United States v. Mississippi Tax Commission, supra.* It will be shown herein that the remaining authorities relied upon by appellants similarly fail to support their position.

Appellants' reliance upon *DeAryan v. Akers,* 12 Cal.2d 781, 87 P.2d 695 (1939) is misplaced. In *DeAryan,* the Court held that the legal incidence of the sales tax was on the retailer and that insofar as the purchaser was concerned sales tax reimbursement was merely part of the purchase price agreed upon and nothing more. While the *DeAryan* case recognizes that the economic burden of the sales tax will usually be borne by the purchaser, it held, as did this Court in *Gurley v. Rhoden, supra,* that this was irrelevant with respect to determining the legal incidence of the tax.

Contrary to the assertion of appellants (J.S. 14), the *DeAryan* case does not hold that if a retailer separately

states the tax, he may collect it from the consumer as a debt. This is simply not the California law. It is clear under California law that unless the purchaser contracts to pay the sales tax reimbursement at the time the sale is made, the retailer is precluded from collecting sales tax reimbursement. *National Ice, etc. Co. v. Pacific Fruit Express,* 11 Cal.2d 283, 79 P.2d 380 (1938); *Pacific Coast Engineering Co. v. State of California, supra.*

The cases cited above make it clear that under California law a retailer who fails to obtain sales tax reimbursement from the purchaser is not thereby relieved of liability to the state. A California retailer does not have a right to collect any amount of sales tax reimbursement unless the purchaser agrees to pay such sum.

Appellants seek to attach significance to the fact that if a retailer has improperly collected sales tax reimbursement from his customers, the retailer obtaining a refund must pay back the overreimbursement to the purchasers. *Decorative Carpets Inc., v. State Board of Equalization,* 58 Cal.2d 252, 373 P.2d 673 (1962); *Javor v. State Board of Equalization.* 12 Cal.3d 790, 527 P.2d 1153 (1974).

In *Javor,* the California Supreme Court held that if sales tax reimbursement is overpaid by mistake, the purchaser has no direct claim against the State Board of Equalization but in certain unique situations may join the Board in a class action against retailers to insure that the overreimbursement is refunded to the retailers for distribution to the purchasers. There is not the slightest suggestion in *Javor* that the retailer was required to pass the tax on to the purchaser. The Court held it necessary, however, that the retailer be a party to any litigation to recover any overpayment. This Court in *Gurley v. Rhoden,* 421 U.S. 200 at 206 (1975) held that even though under the statute there

involved the purchaser could get a direct refund from the government of tax paid on gasoline used for non-highway purposes, this did not affect the Court's conclusion that the legal incidence of the tax was on the seller.

The appellants also seek to attach significance to the fact that it is the general practice of California retailers to seek to cover their costs by adding sales tax reimbursement as a component to the total price charged. Unfortunately for appellants, this Court has declared that as long as the tax is imposed on the vendor, it may be validly applied even though the vendor increases his price to a federal instrumentality because of the tax. *Berkshire, supra;* see also *Gurley v. Rhoden, supra.*

The appellants further cite excerpts from certain legislative materials published decades after the California Sales Tax Act was enacted in support of the proposition that the incidence of the California sales tax is on the purchaser. It is noteworthy that the Court in *Gurley* in rejecting a similar argument with respect to a Congressional report, said:

> "But these references obviously were not made in the context of consideration of the legal incidence of the gasoline tax but merely as recognition that the reality is that users bear the economic burden of the tax." 421 U.S. 200 at 207.

The Court then dismissed these references as being irrelevant.

The appellants, in an effort to establish the importance of this case, refer to a federal decision involving the Nevada sales tax, which they allege is in conflict with the decision in the instant case (*United States v. Nevada Tax Commissions,* 291 F.Supp. 530 (D.Nev. 1968 aff'd 439 F.2d 435 (9th Cir. 1971)). They neglect to point out that the

federal courts were accepting the interpretation of the Nevada statute by the Nevada Attorney General who had concluded that the legal incidence of the Nevada sales tax falls on the purchaser.[13] Moreover, the federal District Court noted at page 533 that under Nevada law (unlike that of California) the retailer receives a commission for collecting the sales tax from the purchaser.

Appellants' assertion at page 20 of the Jurisdictional Statement that this Court should retain jurisdiction of this case because otherwise other states might change their laws to tax federal instrumentalities will not stand close analysis. This Court has established standards as to legal incidence which will determine the validity of a state tax as it relates to federal instrumentalities. The criteria applied by the Court of Appeal in the instant case correctly applies those criteria. Accordingly there is no occasion for this Court to restate its established standards as to this matter.

E. THE ARGUMENTS OF AMICUS CURIAE ARE WITHOUT MERIT.

The Solicitor General expresses an interest in this case by virtue of pending litigation involving the imposition of sales tax with respect to leases to the federal government. The case in question is *United States v. State Board of Equalization*, C.A. 9, No. 74-3360. That case presents an additional issue, i.e. discrimination against the United States. In that case the trial court without opinion ruled that for federal purposes the legal incidence of the California sales tax was on the purchaser and therefore could not be validly applied to leases to the United States.

The findings of fact and conclusions of law of the District Court in that action are set forth in Appendix C

13. See Opinion of the Attorney General No. 540, September 18, 1968 (CCH State Tax Reporter, Nevada, Par. 200-455)

to the Jurisdictional Statement. It is to be noted that the trial court concluded that the sales tax was invalid without regard to whether the United States was contractually obligated to reimburse the retailer or not. There is no doubt support for such a conclusion in *Panhandle Oil Co. v. Knox*, 277 U.S. 218 (1928) which held invalid a sales tax on a retailer to the United States Government even though the tax might not be passed on by the retailer. However, in *Alabama v. King & Boozer*, 314 U.S. 1 at 8, 9 (1941), this Court expressly rejected the principle of the *Panhandle Oil* case. While this Court is moving in the direction of removing restrictions on State taxation in cases such as *Michelin Tire Corp. v. Wages*, 44 L.W. 4070 (Jan. 14, 1976), the federal government is retreating toward a nineteenth century concept of all encompassing intergovernmental immunity insofar as state taxes are concerned.[14] Cf. *United States v. City of Detroit*, 355 U.S. 466 (1958).

While the amicus curiae brief makes several references to *Kern Limerick Inc. v. Scurlock*, 347 U.S. 110 (1954), that case is not in point. That case involved the status of the purchaser. It was held that the sales there involved qualified for an express statutory exemption in the Arkansas Gross Receipts Tax Law as "sales to the United States." No question is raised in the instant case or in *United States v. State Board of Equalization, supra*, as to the status of the purchaser involved.

14. Thus the District Court in the above case accepted the argument of the federal government that a sales tax on retailers to the federal government is "invidiously discriminatory" against the federal government even though there is a use tax of equal magnitude borne by other lessees. This involves a disregard of principles established by this Court in cases such as *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) and *Tradesmens Bank v. Tax Comm'n.*, 309 U.S. 560 (1939) that there is no discrimination against a federal instrumentality or against interstate commerce unless there is a greater tax burden thereon, giving consideration to the total tax structure of the State.

The Solicitor General makes no arguments in addition to those raised by appellants in the Jurisdictional Statement. It is to be observed that the brief of amicus curiae, although challenging the holding of the California state courts that the tax is imposed on the retailer, avoids considering the actual operation of the California sales tax for 40 years, to which the United States has expressly stipulated. (See Appendix C); *St. Louis S.W. Ry Co. v. Arkansas,* 235 U.S. 350, 362 (1914). Nor does it consider the significant differences between the vendor type California tax and the hybrid type Massachusetts tax discussed herein. Accordingly, the amicus curiae brief is neither informative nor persuasive.

CONCLUSION

Wherefore, appellee respectfully submits that the issue here involved is so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the case by the California Court of Appeal.

Respectfully submitted.

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(APPENDICES FOLLOW)

APPENDIX

ARTICLE 151: Taxes. XII 47 6518
I. T. 2733

REVENUE ACT OF 1932.

The tax imposed under the provisions of the California retail sales tax act of 1933 is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes the tax is an allowable deduction as a tax under section 23(c) of the Revenue Act of 1932 to the vendor only, upon whom it is imposed and who is liable for its payment. Where the vendor collects the amount of the tax from the vendee he must include the amount so collected in his gross income. The amount equivalent to the tax paid by the purchaser constitutes additional cost to him of the article purchased.

Advice is requested whether the California sales tax, imposed upon the vendor for the privilege of engaging in the business of making sales at retail, is an allowable deduction by the vendor or the vendee for Federal income tax purposes.

The law under which the tax is imposed is the "Retail sales tax act of 1933." Section 3 provides:

SEC. 3. For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers at the rate of 2½ per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after August 1, 1933, and to and including June 30, 1935; and at the rate of 2 per cent of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State on and after July 1, 1935. Such tax shall be paid at the time and in the manner hereinafter provided and shall be in addition to any and all other taxes.

Other provisions of the law, so far as pertinent to the discussion of the question presented, read as follows:

SEC. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

* * * * * * *

(f) "Gross receipts" means the total amount of the sale price of the retail sales of retailers, including any services that are a part of such sales, valued in money, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also any amount for which credit is allowed by the seller to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses or any other expense whatsoever; provided, however, that cash discounts allowed and taken on sales shall not be included, and "gross receipts" shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit, nor shall "gross receipts" include the price received for labor or services used in installing, applying, remodeling or repairing the property sold.

For the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer.

(g) "Board" means the State Board of Equalization.

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* * * * * * *

SEC. 8. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

SEC. 8½. The tax hereby imposed shall be collected by the retailer from the consumer in so far as the same can be done. * * *

SEC. 9. The tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable in quarterly installments on or before the 15th day of the month next succeeding each quarterly period * * *.

* * * * * * *

SEC. 12. Thirty days after the effective date of this act, it shall be unlawful for any person to engage in or transact business as a retailer within this State, unless a permit or permits shall have been issued to him as hereinafter prescribed. * * *

The tax imposed under the provisions of the California retail sales tax act of 1933 is an excise tax imposed by the State on the vendor for the privilege of engaging in the business of making sales at retail. For Federal income tax purposes the tax is an allowable deduction as a tax under section 23(c) of the Revenue Act of 1932 to the vendor only, upon whom it is imposed and who is liable for its payment. Where the vendor collects the amount of the tax from the vendee, he must include the amount so collected in his gross income. The amount equivalent to the tax paid by the purchaser constitutes additional cost to him of the article purchased.

In the case of a vendor whose books are kept on the accrual basis, the amount of the tax actually accrued during the period covered by his Federal income tax return may be deducted in determining his net income. Where the vendor's books are kept on the cash receipts and disbursements basis, only the amount of the tax actually paid during the period covered by his Federal income tax return may be deducted in determining his net income.

(A-88689)

STATE SALES TAXES—INCLUSION IN FEDERAL AID UNEMPLOYMENT COMPENSATION ADMINISTRATION GRANTS

The Social Security Board is authorized to include in its grants under section 302 (a) of the Social Security Act to the State of California for unemployment compensation administration an amount representing the California retail sales tax—the legal incidence of which is upon the vendor—which the department of employment or other agency of the State is required to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the unemployment compensation laws of that State. 17 Comp. Gen. 223, modified.

Comptroller General Warren to the Federal Security Administrator, January 31, 1942:

With reference to the decision of September 8, 1937, of this office to the Chairman, Social Security Board, 17 Comp. Gen. 223, wherein it was held that the Social Security Board is not authorized to include in its grants to States the amount of the State sales tax which the State agencies are required under State laws to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the State unemployment compensation laws, there has been received from Fred E. Stewart, a member of the State Board of Equalization of the State of California, a letter dated December 9, 1941, reading as follows:

> The Department of Employment of the State of California informed us that the Acting Comptroller General of the United States on September 8, 1937, advised the Social Security Board that it was not authorized to include in its grants to this State under the provisions of section 302 (a) of the Social Security Act "the amount of the State sales tax which the State agencies are required under State laws to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the State unemployment compensation laws." The reason given in the opinion is that "the appropriation of Federal funds" is not "available for that purpose."
>
> One of the items in the budget which was presented to the Social Security Board by the Unemployment Reserves Commission of this State was "the amount of State sales tax paid in connection with the purchase of supplies and equipment necessary for the administration of the State unemployment compensation laws," and the Social Security Board requested your advice as to whether it was authorized to include in its grants to this State the amounts so itemized and described in the budget. The request, in our opinion, did not disclose the true nature and legal incidence of the California Retail Sales Tax Act.
>
> The Social Security Board has withheld from its grants to the State the budgeted items described above. Vendors selling supplies and equipment to the State of California for use by the department of employment, a State agency, have, accordingly, been unable to collect the full amount of the selling price, which results in confusion and misunderstanding.
>
> The nature of the California tax is set forth in section 3 of the California Retail Sales Tax Act, which provides:
>
> "For the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers * * * at the rate of 3% of the gross receipts of any such retailer from the sale of all tangible personal property sold at retail in this State * * *."

The term "retailer" is defined by section 2, subdivision (c) of the act as:

"Every person engaged in the business of making sales at retail • • • of tangible personal property • • •."

The nature of the tax has been uniformly construed by not only the State, but the Federal courts, as a tax upon vendors for the privilege of engaging in business at retail, and its legal incidence has been determined to be upon the seller and not upon the purchaser.

In *Western Lithograph Co.*, v. *State Board of Equalization*, 11 Cal. (2d) 158, 164, the California Supreme Court stated:

"The tax being a direct obligation of the retailer and, so far as the consumer is concerned, a part of the price paid for the goods and nothing else, it is neither in fact nor in effect laid upon the consumer. It does not become a tax on the sale nor because of the sale, but remains an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales."

In addition to the *Western Lithograph Co., case, supra*, the following cases definitely place the legal incidence of the tax upon the seller:

Roth Drugs, Inc., v. *Johnson*, 13 Cal. App. (2d) 720.
Meyer Construction Company v. *Corbett*, 7 Fed. Supp. 616.
People v. *Herbert's of Los Angeles*, 3 Cal. App. (2d) 482.
Graham Brothers, Inc., v. *City of Los Angeles*, 6 Cal. App. (2d) 203.
National Ice & Cold Storage Co., v. *Pacific Fruit Express Co.*, 11 Cal. (2d) 283.
DeArgan v. *Akers*, 12 Cal. (2d) 781, Certiorari denied by U. S. Supreme Court, Oct. 9, 1939, Mem. 308 U. S. 581.

In *Roth Drugs, Inc.*, v. *Johnson*, *supra*, the Court stated at page 736:

"This act does not impose the tax on the consumer. The last-mentioned section (sec. 8½) merely authorizes the retail merchant to reimburse himself from the consumer insofar as it may be consistently done. He is not required to do so. He may waive that right. Section 8 of the act merely declares that it shall be unlawful for the retailer to advertise that he will assume and pay the tax or that he will not add it to the price of his merchandise upon sale thereof. In considering the entire act we are impelled to hold it is merely optional with the retail merchant as to whether he will reimburse himself from his customers for the tax he is compelled to pay. The act specifically declares that the tax is imposed on retail merchants, and not on the consumers. Section 3 provides in that regard, 'for the privilege of selling tangible personal property at retail a tax is hereby imposed upon retailers.' Section 9 of the act further provides that 'The tax levied hereunder shall be a direct obligation of the retailer.' Section 12 of the act prohibits any retail merchant from maintaining his business without first procuring a permit therefor as provided by that measure."

The amount of the purchase price is a matter of contract between the seller and the purchaser, each being free to refrain from selling or buying, as the case may be, except on such terms as to him may seem proper. The seller in order to determine the selling price of the merchandise must as a matter of course consider the amount of property, income, franchise, excise, and similar taxes, which he is called upon to pay by local, State, or Federal Government. Any tax, the legal incidence of which is upon the seller, cannot be disregarded by him in determining the selling price.

On November 10, 1941, the Supreme Court of the United States in two cases, *The State of Alabama* v. *King and Boozer*, 62 Sup. Ct. 43, 86 L. Ed. (Adv. Op.) 1, and *John C. Curry* v. *United States*, 62 Sup. Ct. 48, 86 L. Ed. (Adv. Op.) 6, considered the application of the Alabama sales and use taxes in connection with purchases made by "cost-plus-a-fixed-fee" contractors with the Federal Government.

The Court in the *King and Boozer case* stated:

"The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory State tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the

organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox, supra*; *Graves* v. *Texas Co., supra*, we think it no longer tenable."

The Court in the *Curry case* in considering the economic effect upon the Government makes the following statement:

"For the reasons stated at length in our opinion in the *King and Boozer case* we think that the contractors, in purchasing and bringing the building material into the State and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the State law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the *King and Boozer case*, by concession of the Government and on authority, the Constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

In view of these recent decisions, we respectfully request that you give further consideration to this problem, and that you advise the Social Security Board that it may include in its grants to the State of California the entire amount which the department of employment is required to pay in connection with the purchase of supplies and equipment for the administration of the California Unemployment Reserves Act without the deduction of any amount which may improperly be designated as a tax, but which actually constitutes a part of the purchase price of supplies and equipment.

Section 302 (a) of the Social Security Act, 49 Stat. 626, provides, in part—

> The Board shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Board under title IX, such amounts as the Board determines to be necessary for the proper administration of such law during the fiscal year in which such payment is to be made. • • •

The decision of September 8, 1937, *supra*, apparently was predicated to a considerable extent upon the ruling of the Supreme Court of the United States in the case of *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, to the effect that the vendor of gasoline sold to the United States was exempt from the payment of an excise tax measured by the quantity of gasoline sold upon the theory that the tax fell upon the Government. However, a careful examination of the recent decision of the Supreme Court of the United States in the case of *State of Alabama* v. *King and Boozer*, 314 U. S. 1, 86 L. ed. (Adv. Ops.) 1, leaves little or no room for doubt that a vendor who sells supplies to the United States is not exempt from the payment of a State sales tax upon the transaction unless the legal incidence of the tax is upon the vendee. And the holding of the Supreme Court of California is that the legal incidence of the retail sales tax

of that State is upon the vendor (*Western Lithograph Co.* v. *State Board of Equalization, et al.*, 11 Cal. (2d) 156), so that the tax is not to be regarded as being passed on, as such, to the purchaser. Cf. *Lash's Products Co.* v. *United States*, 278 U. S. 175.

Such being the case it would appear that the price paid by the department of employment or other agency of the State of California for such supplies or equipment purchased by it as are "necessary for the proper administration" of the State's unemployment compensation laws may not be viewed as including, as such, the tax imposed on vendors by the provisions of the California Retail Sales Tax Act of 1933, as amended, although the sale price of the supplies or equipment may have been increased by reason of the imposition of such tax on the vendor; and as it thus appears that the tax loses its identity as such and is merged in the purchase price paid by the State agency, the theory that grants which may be made to the State to cover the additional expense would be diverted to the payment of a State tax seems no longer tenable. Cf. decision of August 2, 1940, to you.

Accordingly, in view of the foregoing, I have to advise that the Social Security Board is authorized to include in its grants to the State of California for the purpose set forth in section 302 (a) of the Social Security Act the entire amount which the department of employment or other State agency is required to pay in connection with the purchase of supplies and equipment the Board finds necessary for the proper administration of the unemployment compensation laws of that State without the deduction of any amount on account of the additional expense incurred by reason of the tax imposed by the provisions of the California Retail Sales Tax Act of 1933, as amended.

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Appendix C

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In the United States District Court for the Central District of California

Civil No. 72-2568-R

United States of America,
Plaintiff

vs.

State Board of Equalization,
Defendant

STIPULATION OF FACTS

The parties to this action, by their undersigned attorneys, hereby stipulate and agree that the following facts shall be deemed true and correct for the purpose of any hearing or trial herein; at any hearing or trial of this action, any party may offer any further evidence not inconsistent with any facts below stated; and each party reserves the right to

object to the admissibility, on any appropriate ground, of any further evidence offered by any other party.

1. This action is brought at the request of plaintiff's General Services Administration and under the direction of the Attorney General of the United States.

2. Defendant is authorized to and administers and enforces the provisions of Parts 1, 1.5 and 1.6 of Division 2 of the Calito.nia Revenue and Taxation Code (hereafter referred to as the "California Sales and Use Tax Law") and the local ordinances enacted pursuant thereto.

3. The amount in controversy exceeds ten thousand ($10,000) dollars, exclusive of interest and costs; plaintiff asserts invalidity under the Constitution of the United States; and the action is commenced by the United States.

4. The plaintiff, through its departments and agencies, has leased since August 1, 1965 and continues to lease data processing equipment and other tangible personal property in California from various lessors.

5. Since 1965 when the California Sales and Use Tax Law was amended, the defendant has taken the position that, under the California Sales and Use Tax Law, the lessors' gross receipts from leases of property in California to the Federal Government, state banks, national banks or insurance companies are includable in the measure of the lessors' sales tax.

6. These lessors have, since on or about October 31, 1965, remitted to the defendant substantial amounts in sales taxes measured by such leases.

7. Under many of the agreements between the plaintiff and its lessors, the plaintiff is contractually obligated to reimburse its lessors an amount equal to the amount of

sales tax paid by the lessors measured by such leases; since October 1, 1966, the plaintiff has reimbursed certain of its lessors for some of the sales taxes remitted by them to the Board. The amount reimbursed by the plaintiff is substantial (plaintiff believes that it is in excess of $1,000,000). Under many of such agreements, it was agreed between the plaintiff and its lessors that plaintiff is entitled to the benefit of any recovery by the lessors of sales taxes paid by the lessor to the Board.

8. Plaintiff believes that there may be some leases in which plaintiff has neither agreed to pay nor paid sales tax reimbursement to its lessors, but if so, the comparative dollar amount is small. In such cases, the lessors would have included their gross receipts in their sales tax measure and have no rights or claims against plaintiff arising therefrom.

9. In this action plaintiff contends that as a matter of Federal law the legal incidence of the sales tax falls on the Federal Government as lessee regardless of whether or not the Federal Government has contracted to reimburse to its lessors amounts of California Sales Tax paid by the lessors. Plaintiff contends that the contractual arrangement between the Federal Government and the lessor has no bearing on where the legal incidence of the sales tax falls. In this action, however, the Federal Government seeks recovery only in the amount of those taxes paid by its lessors for which the Federal Government has reimbursed its lessors.

10. On October 14, 1969, plaintiff brought an action for declaratory judgment and refund of taxes in the United States District Court for the Central District of California, civil number 69-2050-JWC, captioned *United States v. State Board of Equalization* (hereinafter referred to as the "Federal Court Action").

11. On October 7, 1970, the United States District Court for the Central District of California granted defendant's motion to dismiss said Federal Court Action "without prejudice to plaintiff's right to litigate in any United States Court, after a state determination of state issues, any federal issue withheld from submission to the state court."

12. On June 28, 1971, plaintiff brought an action for declaratory judgment in the Superior Court of the State of California in and for the County of Los Angeles, civil number C 6215 (hereafter referred to as the "State Court Action") for the sole purpose of obtaining a determination of the issues of state law which it raised in the earlier Federal Court Action and wished to pursue.

13. In the State Court Action, plaintiff withheld from submission to the state court its "federal claim for refund of taxes" and all questions on federal law. It was plaintiff's view that for purposes of plaintiff's claim of federal constitutional immunity, the questions of (a) where the legal incidence of the tax which has been imposed falls when the lessee is the Federal Government and (b) whether that tax discriminates in violation of the Federal Constitution against the plaintiff and those with whom it deals are federal questions.

14. On July 20, 1972, the Superior Court of the State of California in and for the County of Los Angeles entered its order that the tax imposed with respect to the transactions described herein "is a sales tax, not a use tax."

15. This action is brought in order that the federal issues raised by plaintiff may now be litigated.

16. Under the California Sales and Use Tax Law:

(a) Since 1933, sales tax is imposed on a seller for the privilege of selling tangible personal property in California

at retail; the legal obligation to pay the sales tax is on the seller; the buyer has no obligation to or rights against the State of California; a sales tax may be lawfully imposed even though the user be exempt from sales and use tax; the seller has no rights (except those created by contract between seller and buyer) to reimburse to himself or otherwise recover from the buyer the amounts of sales tax paid by the seller; it is the prevailing (but not uniform) practice, however, for the buyer and seller to separately state and collect sales tax reimbursement in their sales agreement;

(b) Since 1935, use tax is imposed on a user of tangible personal property purchased for use in California from a retailer;

(c) Since 1965, a lessor of tangible personal property in California is a seller subject to sales tax under (a) *supra* and a lessee is a user subject to use tax under (b) *supra;*

(d) Since 1935, transactions subject to sales tax are exempt from use tax; except that since 1965, with respect to leases, transactions subject to use tax are exempt from sales tax and a use tax is payable with respect to all leases (except leases where the lessee is exempt from tax, for example, the Federal Government, banks and insurance companies).

(e) The Federal Government, certain agencies and instrumentalities of the United States, banks and insurance companies are exempt entities upon whom neither sales nor use taxes may be imposed.

17. The California law set out in Paragraph 16(a) *supra* represents a consistent and repeated forty-year interpretation of the sales tax administrator, California Legis-

lature, California Attorney General and state and federal courts.

18. The Federal Government does not challenge the statements of California law in paragraph 16 insofar as they affect anyone other than the Federal Government, its agencies and instrumentalities. The Federal Government contends, under its interpretation of the decisions of the United States Supreme Court, that when a tax affects federal immunity, the question of where the legal incidence of that tax falls is a federal question and the courts are not bound by a state's characterization of its statute.

19. Since 1933, gross receipts from sales to banks, insurance companies, and (to the extent not exempted by California law) to the Federal Government have been included in the measure of the seller's sales tax.

20. There are numerous leases of tangible personal property in California to state banks, national banks and insurance companies, the gross receipts from which have been since 1965 included in the measure of the lessors' sales tax.

21. The United States until November 1968 did not in any way dispute California's interpretation of its sales tax law that the legal obligation thereof is upon the retailer. Attached are a decision of the Comptroller General, A-88689, January 21, 1942; a letter from General Services Administration of the United States to the State Board of Equalization of California dated March 15, 1967; and a letter dated April 5, 1968 from the Office of General Counsel of the United States General Accounting Office addressed to Hertz Corporation. The United States has found no other relevant letters or documents prior to

November 1968 reflecting legal analysis of the California Sales Tax Law in its files.

Dated: May 18, 1973

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(Exhibits Omitted)

Supreme Court, U. S.
FILED
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No. 75-1038

In the Supreme Court of the United States

OCTOBER TERM, 1975

DIAMOND NATIONAL CORPORATION, APPELLANT

v.

STATE BOARD OF EQUALIZATION

CROCKER-CITIZENS NATIONAL BANK, APPELLANT

v.

STATE BOARD OF EQUALIZATION

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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INTEREST OF THE UNITED STATES

These consolidated cases present the question whether the legal incidence of the California sales tax is on the purchaser of personal property so as to render unconstitutional its imposition upon purchases by a federal instrumentality such as a national bank. The issue is currently awaiting oral argument in the United States Court of Appeals for the Ninth Circuit in a suit brought by the United States challenging and imposition of the California sales tax with respect to leases of tangible personal property to

the United States and seeking the recovery of more than $12 million in taxes (*United States* v. *State Board of Equalization*, C.A. 9, No. 74-3360). In the federal suit, the United States District Court for the Central District of California held that the California sales tax was unconstitutional as applied with respect to leases to the United States, because the legal incidence of the tax fell on the federal government as lessee (J.S. App. C 45-49). In these cases, the California Court of Appeal concluded that the legal incidence of the California sales tax was on the vendor and thereby upheld the imposition of the tax on sales to national banks. The resolution of the federal immunity question here will substantially affect the rights of the United States and govern the disposition of its pending suit involving the same issues.

QUESTION PRESENTED

Whether the California sales tax, which provides that the tax "shall be collected by the retailer from the consumer in so far as it can be done," is unconstitutional as applied to sales to a national bank.

STATEMENT

Appellants brought these consolidated suits for refund of California and local sales taxes in the Superior Court of California.[1] The suits challenged the constitutionality, under federal immunity principles, of the application of the California sales tax to sales to

[1]Appellant Diamond National Corporation sold printed forms and other items of tangible personal property to appellant Crocker-Citizens National Bank. During the period at issue, Crocker paid sums over to Diamond representing "sales tax reimbursement" which Diamond paid over to the state. Both Crocker and Diamond filed claims for refund which were disallowed. Diamond has agreed that any refund returned to it would be refunded to Crocker (J.S. App. A 24-25).

national banks. The superior court held that the legal incidence of the California sales tax is on the purchaser, so that purchases by Crocker-Citizens National Bank, a national bank, are exempt from the tax under federal immunity principles (J.S. App. B 35-39). However, the California Court of Appeal reversed. It held that the legal incidence of the tax was on the retailers. Although the California sales tax statute provides that the tax "shall be collected by the retailer from the consumer" the court distinguished this Court's decision in *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, on the ground that California, unlike the Massachusetts tax involved in that case, had no "mandatory requirement" that its sales taxes be passed on to the purchaser (J.S. App. A 23-33). The California Supreme Court denied appellant's petition for hearing (J.S. App. E 55).

DISCUSSION

This case presents a substantial constitutional question that should be resolved by this Court.

1. In *Agricultural Bank* v. *Tax Commission, supra*, 392 U.S. 339, this Court held that the Massachusetts sales tax could not constitutionally be imposed on purchases by a national bank, because a sales tax is not among the state taxes permitted by 12 U.S.C. 548 to be levied on national banks, and because the legal incidence of the tax fell upon the purchaser. The test formulated by the Court in *Agricultural Bank* and reaffirmed more recently in *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 607-608, is that "a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347).

This case presents the identical question in the context of the California sales tax levied upon the purchases

of a national bank. The pertinent California sales tax provisions state that the tax "shall be collected by the retailer from the consumer in so far as it can be done" and that it is unlawful for any retailer to advertise or hold out to the public or to any customer that the tax will be absorbed by the retailer or that it will not be added to the selling price of the property sold.[2] These provisions are not in substance distinguishable from the Massachusetts sales tax that the Court in *Agricultural Bank* held unconstitutional as applied to national banks.[3] Under the *Agricultural Bank* test, there can be no doubt that the California legislature intended that this sales tax be passed on to the purchaser. As the Court emphasized in *Agricultural Bank*, "For our purposes, at least, that intent is controlling" (392 U.S. at 348). Thus, just as a national bank is immune from the Massachusetts sales tax, it is similarly protected from the California sales tax at issue in this case. Accord: *United States* v. *Mississippi Tax Commission*, 421 U.S. 599; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110; and *United States* v. *Nevada Tax Commission*, 291 F. Supp. 530 (D. Nev.), affirmed, 439 F.2d 435 (C.A. 9).

2. Contrary to the decision below (J.S. App. A 29), this Court's decision in *Gurley* v. *Rhoden*, 421 U.S. 200,

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[2]Revenue and Taxation Code, West's Ann. Calif. Codes §§ 6052 and 6053 (1970 ed.).

[3]Significantly, in *Agricultural Bank, supra*, the Massachusetts Supreme Judicial Court noted (229 N.E.2d 245, 250-251) that the Massachusetts statutes did not require the vendor to collect the tax from the consumer, but rather made such collection optional. Thus, the fact that Section 6052 of the California Revenue and Taxation Code provides that the tax "shall be collected by the retailer from the consumer *in so far as it can be done*" (emphasis supplied) does not, as the decision below erroneously concluded (J.S. App. A 28), distinguish it from the Massachusetts statute.

is not germane to the resolution of the federal tax immunity question here. In *Gurley*, the question was whether, under Mississippi law, the legal incidence of the Mississippi gasoline tax fell on the distributor-vendor or on the purchaser, neither of whom was a federal entity or agency. In resolving that question, the Court gave great weight to the holdings of the Mississippi Supreme Court with respect to the legal incidence of its excise tax. But where, as here, the question is whether the tax affects federal immunity, the Court has repeatedly held that "it is clear that for this limited purpose we are not bound by the state court's characterization of the tax." *Agricultural Bank* v. *Tax Commission, supra*, 392 U.S. at 347. Cf. *Kern-Limerick, Inc.* v. *Scurlock, supra*, 347 U.S. at 121. Thus, the characterizations of the California sales tax by the California Supreme Court, upon which the decision below relied (J.S. App. A 27-28), are not controlling with respect to the immunity question. At all events, the California decisions[4] invoked by the Court of Appeal for the proposition that the legal incidence of the tax fell on the vendor were decided on the theory that the vendor was legally obligated to pay the tax—a rationale expressly rejected by this Court in *Agricultural Bank*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[4]*Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 78 P.2d 731; *De Aryan* v. *Akers*, 12 Cal. 2d 781, 87 P.2d 695. See also *Ainsworth* v. *Bryant*, 34 Cal. 2d 465, 211 P.2d 364.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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DIAMOND NATIONAL CORPORATION,
a Delaware corporation,
Appellant,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee.

CROCKER-CITIZENS NATIONAL BANK,
a national banking association,
Appellant,

v.

STATE BOARD OF EQUALIZATION,
an agency of the State of California,
Appellee.

On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two.

REPLY MEMORANDUM FOR THE APPELLANTS

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REPLY MEMORANDUM FOR THE APPELLANTS

1. Appellee's principal argument in its motion to dismiss or affirm (pp. 9-14) is that the California sales tax is distinguishable from the Massachusetts sales tax considered in *First Agricultural National Bank of Berkshire County* v. *State Tax Commission,* 392 U.S. 339 (1968). There, the Court held that the Massachusetts sales tax could not constitutionally be imposed on purchases by a national bank because the legal incidence of the tax fell upon the purchaser. In appellee's view, the legal incidence

of the California sales tax is not upon the purchaser-bank because the statute contains no "mandatory requirement" that the tax be passed on to the purchaser.

However, a simple comparison between the two statutes demonstrates the error of appellee's claim. As this Court noted in *Agricultural Bank* (392 U.S. at 347), the Massachusetts statute provided that "reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in the commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section * * *." In *Agricultural Bank,* the Court held that "this subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser." Moreover, the Court reinforced its conclusion by invoking another provision of the Massachusetts sales tax statute which prohibited as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make (*id.* at 347-348).

For purposes of the rule of *Agricultural Bank,* the California sales tax statute is essentially equivalent to the Massachusetts provisions. Section 6052 of the California Revenue and Taxation Code provides that: "The tax hereby imposed shall be collected by the retailer from the consumer in so far as it can be done."[1] In addition, Section 6053 of that Code makes it unlawful for any retailer to

[1]The statutory phrase "in so far as it can be done" does not require a different result. That phrase has been construed to indicate a reservation only in those cases where a retailer's pursuit of reimbursement would infringe upon the consumer's contractual or other constitutional rights. See *DeAryan* v. *Akers,* 12 Cal. 2d 781, 786, 86 P.2d 695 (1938). The same is true under the Massachusetts sales tax law which exempts from the sales tax "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States." Mass. Acts and Resolves, 1966, c. 14 § 6(a). California has a similar provision. See Section 6352 of the Revenue and Taxation Code.

advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold. Thus, just as in the case of the Massachusetts statutes, there can be no doubt from the clear wording of the California provision that the legislature intended that this sales tax be passed on to the purchaser.[2]

Moreover, in *Agricultural Bank,* this Court assumed as true the conclusion of the Massachusetts Supreme Judicial Court (229 N.E.2d at 249) that there was no statutory sanction against a vendor who refused to pass on the tax. But the purported absence of a sanction was not controlling as to the question whether the legal incidence of the tax was on the purchaser. As the Court stated, the force of the law was such that "regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written." In fact, the record in this case clearly demonstrates that the California commercial practice is to pass on the tax. The parties have stipulated that it is the general custom and practice for California retailers to state separately the "sales tax reimbursement" and for consumers to pay the "sales tax reimbursement" to the retailer (J.S.,5 Appen. J.S.,85). *Agricultural Bank* is therefore controlling.

Given the analysis of *Agricultural Bank,* the previous characterizations of the California sales tax by the California Supreme Court, upon which appellee relies (Motion, pp. 10-11), are no longer relevant to the resolution of the immunity question in this case.[3] As the Court stated in

[2]In fact the California legislature has specifically so stated on at least two occasions, see committee reports, J.S., 15 n. 6.

[3]I.T. 2733, XII-2 Cum. Bull. 46, cited by appellee (Motion, p. 11), which was issued by the Internal Revenue Service in 1933, was declared obsolete by the Service in 1968 in Revenue Ruling 68-100, 1968-1 Cum. Bull. 572.

Agricultural Bank, "Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax" (392 U.S. at 347). At all events, those California cases were decided on the theory that the vendor was legally obligated to pay the tax—a rationale which the Court rejected in *Agricultural Bank.*

2. Finally, the stipulation in *United States* v. *Board of Equalization*, now awaiting argument in the Ninth Circuit (No. 74-3360), does not support appellee's argument (Motion, pp. 6-7 and n. 5) that the legal incidence of the California sales tax is on the vendor. The absence of an express provision in the California sales tax statute giving the seller the right to recover the tax from the buyer is not constitutionally significant. In fact, California law affords the seller the right to sue for reimbursement of the tax if it is separately stated and the buyer accepts the goods or is otherwise contractually bound to reimburse the seller for the tax.[4]

The critical fact, however, is not whether the retailer may sue at law for reimbursement but whether the law contemplates that the tax be passed on to the customer. *United States* v. *Mississippi Tax Commission,* 421 U.S. 599, demonstrates the correctness of this proposition. There, in upholding the state liquor tax on sales to military purchasers, the district court (378 F. Supp. 556, 567) considered it significant that the liquor tax "[could] never become a debt to the supplier separate from the total sales price,

[4]The seller was allowed to recover the separately stated tax in *Graham Bros., Inc.* v. *Los Angeles*, 6 Cal. App. 2d 203, 49 P.2d 452 (1935), pet. for hearing den. Calif. Supreme Court (1935). The seller also has the right to recover the purchase price in these circumstances under the law of sales and the Uniform Commercial Code. *Nakamura* v. *Balish*, 211 Cal. 754, 276 P. 1103 (1931); *Johnson* v. *Besoyan*, 85 Cal. 2d 389, 193 P.2d 63 (1948); California Commercial Code § 2709(1)(a).

nor is it recoverable at law from the purchaser." However, on the authority of *Agricultural Bank,* this Court struck down the tax as unconstitutional as applied to military purchasers. In so holding, the Court stated in terms equally appropriate to this case: "[W]e squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." (421 U.S. at 607)

For the reasons stated above and in our jurisdictional statement, probable jurisdiction should be noted.

Respectfully submitted,

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On Appeal from the Court of Appeal of the State of California, First Appellate District, Division Two

Petition for Rehearing

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Petition for Rehearing

Now Comes the California State Board of Equalization And Respectfully Prays the Court to Grant a Rehearing in This Case Upon the Grounds That the Per Curiam Decision Herein Overrules, Sub Silentio, Gurley v. Rhoden, 421 U.S. 200 (1975), Eliminates Past Guidelines Regarding Legal Incidence of Excise Taxes Without Providing New Ones, Portends Multiplicity of Litigation, Makes Summary Disposition of a Matter Which Will Have a Multimillion Dollar Impact Upon Each of Many States, And Places a Dual Burden On Taxpayers Who Have In the Past Been Charged to Cover Banks Costs, Including Sales Tax Reimbursement, And Must Now Foot the Bill For a Refund of Those Same Amounts to the Banks.

I

On April 19, 1976, this Court in a three sentence per curiam decision reversed the opinion of the California Court of Appeal upholding the validity of the application of the California sales tax to sales to national banks. This Court held that for purpose of federal law the legal incidence of the California sales tax was on the national banks in violation of 12 U.S.C. § 548. This action was taken by the Court without the submission to it of briefs on the merits and without the presentation of oral argument. The sole authority relied on by the Court was *Agricultural Bank v. Tax Commission,* 392 U.S. 339 (1968).

II

Yet, under the rule set forth in the *Agricultural Bank v. Tax Commission, supra,* and reaffirmed in the subsequent decisions in *Gurley v. Rhoden,* 421 U.S. 200 (1975) and *United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975), the legal incidence of an excise tax for federal purposes is on the purchaser only if State law requires the purchaser to pay the tax or reimburse the vendor for a tax payment. Accordingly, under the standards previously applied by this Court, the legal incidence of the California sales tax has always been on the retailer and not on the purchaser national bank. This follows from the fact that under the California sales tax law, as applied uniformly since its enactment forty years ago, there has been no legal obligation that the purchaser pay the tax himself or reimburse the vendor (see Dissent, page 2). Accordingly, although the per curiam decision purports to rely on *Agricultural Bank v. Tax Commission,* 392 U.S. 339 (1968), *supra,* it has in fact ignored the rationale of that decision and in effect overruled the decision in *Gurley v. Rhoden,* 421 U.S. 200 (1975). Thus the Court has eliminated all prior guidelines for determining the legal incidence of a state excise tax for federal purposes.

While the per curiam decision retroactively eliminates the prior rules for determining the legal incidence of an excise tax, it offers no new rules or standards to replace the now abandoned criteria this Court has found sound and usable for many decades. Does the determination of the legal incidence of a tax now turn on the identity of the party challenging its application? Would the legal incidence of the state excise tax on gasoline involved in *Gurley v. Rhoden, supra,* have been regarded as falling on the purchaser if a national bank had challenged its application to it? This seems unthinkable. Or is this Court deciding that in determining the legal incidence of a tax the Court will only look to the language of the statute in a complete vacuum while disregarding the way the tax has been consistently administered and applied in the taxing jurisdiction for decades? Such a conclusion would be directly

contrary to this Court's holding in *United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975), *supra,* wherein the Court determined that the legal incidence of the tax was on the purchaser based upon the manner in which the tax was actually administered. See also *St. Louis S.W. Ry. Co. v. Arkansas,* 235 U.S. 350 (1914). It is difficult to believe that the per curiam decision was based on the premise that administrative construction of a statute is devoid of relevance. In short, the per curiam decision sets us adrift in a rudderless craft to an unspecified destination in a very important area of tax law. This will inevitably result in a multiplicity of litigation by other taxpayers relying on some federal right or immunity in an effort to discover what are the new criteria for determining legal incidence for federal purposes.

III

As observed in the dissenting opinion, the task of determining where the legal incidence of a state tax falls is not the most intriguing work that judges are called upon to perform. Nevertheless, there is a necessity for clear, consistent and meaningful standards to be applied in this regard. The per curiam decision herein eliminates without explanation past guidelines in this regard. Only a void remains. The absence of guidelines will precipitate a rash of litigation with regard to the particular feature or features of the California sales tax and/or the identity of its challenger which caused this Court to conclude the legal incidence fell upon the purchaser for federal purposes. For example, would this Court conclude the legal incidence for federal purposes would be on the retailer if California repealed section 6052 of the Revenue and Taxation Code which provides: "The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done."

IV

Moreover, the fiscal implications of the Court's decision dramaticaliy demonstrates the inapproprietness of the summary per curiam vehicle used. For example, the fiscal impact of the reversal herein on California and its political subdivisions (whose sales tax is based on the state law) for past periods will be millions of dollars with respect to sales to national banks alone, and tens of millions of dollars more when consideration is given to the application of the decision to sales tax with respect of other federal instrumentalities. The refunds covering past years will further imperil the finances of many California cities sharing the nationwide fiscal malaise of large metropolitan areas which is a plainful reality of the seventies. Needless to say, other states with comparable sales tax laws will be similarly affected.

V

If this decision is allowed to stand, it will, moreover, result in placing a dual burden on the taxpayers of this State. Since the California sales tax has been applied to sales to national banks for many decades, it is axiomatic that the amounts paid by them as sales tax reimbursement has become part of the overhead costs considered by the banks in determining charges to their customers, e.g., sales tax reimbursement on printed checks would be reflected in setting checking account fees. By retroactively changing the rules of the game through its per curiam decision herein, this Court will now require California taxpayers to again reimburse national banks (this time out of general tax revenues) many costs which the banks have already recovered in higher charges to customers.

VI

It is respectfully submitted that a rehearing should be granted since the per curiam reversal fails to apply the standards previously established by this Court for determining legal incidence. Moreover, the per curiam decision furnishes no new guidelines for those it has silently abandoned and will encourage further litigation. Principles of sound jurisprudence as well as basic fairness require a rehearing. Either the opinion of the Court of Appeal should be affirmed as contended by the dissenting justices herein or the Court should clearly delineate the new standards for legal incidence which it believes require a reversal herein after full briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Ernest P. Goodman, one of the Attorneys for Appellee, certify this petition is presented in good faith and not for delay.

San Francisco, California, Dated May 5, 1976.

ERNEST P. GOODMAN
ERNEST P. GOODMAN